TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 189.

WESTERN TURF ASSOCIATION, PLAINTIFF IN ERROR,

vs.

HYMAN GREENBERG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 24, 1906.

(20,064.)

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1 In the Supreme Court of the State of California.

S. F., No. 3376.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of California:

The petition of the Western Turf Association, a corporation, incorporated under the laws of the State of California respectfully shows:

That heretofore on the 20th day of December, 1900, in an action then pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in which your petitioner was defendant and Hyman Greenberg was plaintiff, judgment was rendered and entered in favor of the said plaintiff and against your petitioner as defendant for the sum of one thousand (1000) dollars with interest thereon at the rate of seven per cent. per annum and ninety-one dollars costs of suit.

That thereafter your petitioner perfected an appeal from said judgment to the Supreme Court of the State of California, and that on the 12th day of October, A. D. 1905, the judgment of the
2 said Supreme Court was rendered and entered affirming the said judgment of said Superior Court.

That the judgment of the said Supreme Court has become and is final.

That your petitioner desires that the said judgment of the said Supreme Court be re-examined in the Supreme Court of the United States upon a writ of error, and herein shows that in the said action so pending in said Superior Court and in said Supreme Court there was drawn in question the validity of a Statute of the State of California on the ground of the same being repugnant to the Constitution of the United States, and the decision of each of said Courts was in favor of the validity of the said State statute.

And further, that in said action your petitioner specially set up and claimed rights, privileges and immunities under the Constitution of the United States, and the decision of each of the said Courts was against such right, privilege or immunity so set up and claimed.

All of which will more fully appear by the record of the proceedings in the said action, which record is herewith submitted and the same is specially referred to;

Wherefore, your petitioner prays that a writ of error be allowed returnable to the Supreme Court of the United States, and also that

an order be made fixing the amount of a supersedeas bond to be given by your petitioner, and that a citation be issued as provided by law.

And your petitioner will ever pray, etc.

GOODFELLOW & EELLS,
Attorneys for Petitioner.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of a petition for Writ of Error filed December 8th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

3 Upon reading and filing the foregoing petition and assignment of errors, it is ordered that a Writ of Error as prayed for be and hereby is allowed and that the amount of the supersedeas bond to be given by the said petitioner upon said Writ of Error be and hereby is fixed at the sum of Twenty five hundred dollars, and that upon the giving of said bond all further proceedings upon the judgment recovered against the said petitioner be stayed pending the determination of said Writ of Error by the Supreme Court of the United States.

Dated:—December 8th, 1905.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of order of Bond filed December 8th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

4 In the Supreme Court of the State of California.

S. F., No. 3376.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

Assignment of Errors.

Now comes the Western Turf Association, petitioner for Writ of Error herein, and specifies the following as errors upon which it will rely upon its Writ of Error, to-wit:

(1) The Superior Court erred in charging the jury as follows:

"Gentlemen of the jury, I give you the following instructions, requested by plaintiff:

1. I will now read to you the act of the Legislature entitled, 'An Act making it unlawful to refuse admission to places of amusement.

'SECTION 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

'SECTION 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this act, is entitled to recover from the proprietor, lessee or their agents or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

'SECTION 3. This act shall take effect immediately.'"

5 The Superior Court erred in refusing to give to the jury the following instruction requested by the defendant (plaintiff in error herein):

"I instruct you that the act of the Legislature of California of the year 1893, which has been referred to, is unconstitutional and void."

(3) The Supreme Court erred in affirming the judgment of the Superior Court.

(4) The Supreme Court of California erred in affirming the action of the Superior Court in giving to the jury the instruction firstly above mentioned and in refusing to give to the jury the instruction secondly above mentioned.

(5) The Supreme Court of California erred in holding to be constitutional and valid the statute of California approved March 23rd, 1893, entitled: "An Act making it unlawful to refuse admission to places of amusement."

Wherefore, the said petitioner prays that the judgment of the Supreme Court of California may be reversed and annulled.

GOODFELLOW & EELLS,
Attorneys for Petitioner.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an Assignment of Errors filed December 8th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

5½ [Endorsed:] In the Supreme Court of the State of California. Hyman Greenberg, Plaintiff & Respondent vs. Western Turf Association, Defendant & Appellant Petition for Writ of Error &c. Wash. (Copy) Goodfellow & Eells, 324 Pine Street, San Francisco.

6 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Hyman Greenberg, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Court-room thereof in the City of Washington, District of Columbia, on Monday, the 29th day of January, A. D. 1906, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of California, wherein the Western Turf Association is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, in the said Writ of Error mentioned, should not be corrected, reversed and annulled, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California, at San Francisco, this 8th day of December, A. D. 1905.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Citation filed December 8th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

7 [Endorsed:] S. F. No. 3376 Supreme Court Hymann Greenberg *vs.* Western Turf Association Citation. Wash. Goodfellow & Eells, 324 Pine Street, San Francisco.

Receipt of copy of the within Writ of Error is acknowledged this 8th day of December, 1905.

SULLIVAN & SULLIVAN,
E. C. HARRISON,
Att'ys for Defendant in Error.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Supreme Court of the State of California and to the Honorable the Judges thereof, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said Supreme Court, before you between The Western Turf Association, a corporation, Defendant and Appellant therein, Plaintiff in Error herein, and Hyman Greenberg, Defendant and Respondent therein, Defendant in Error herein, a manifest error hath happened, to the great damage of the said Plaintiff in Error as by its complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, *the to* Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day of January next in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 8th day of December in the year of our Lord one thousand nine hundred and five and of our Independence the 130th.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States,
Ninth Judicial Circuit, Northern District of California.

Allowed by,
W. H. BEATTY,
Chief Justice of the Supreme Court of California.

8½ [Endorsed:] Original. S. F. No. 3376. Supreme Court Hyman Greenberg *vs.* Western Turf Association Writ of Error. Wash. Goodfellow & Eells, 324 Pine Street, San Francisco.

Receipt of copy of the within Writ of Error is acknowledged this 8th day of December, 1905.

SULLIVAN & SULLIVAN,
E. C. HARRISON,
Attorneys for Defendant in Error.

9 In the Supreme Court of the State of California.

S. F., No. 3376.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents: That we, Western Turf Association, as principal, and Chas. E. Green as surety, are held and firmly bound, unto Hyman Greenberg, plaintiff and respondent above named, in the sum of two thousand five hundred (2,500.) dollars, to be paid to the said Hyman Greenberg, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the eighth day of December, 1905.

The condition of the above and foregoing obligation is such that, whereas, the above named defendant and appellant, Western Turf Association, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment of the Supreme Court of California in the above entitled cause.

Now, therefore, if the above named Western Turf Association, shall prosecute said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obliga-
10 tion shall be void, otherwise shall be and remain in full force and virtue.

[CORPORATE SEAL.] WESTERN TURF ASSOCIATION,
W. R. BERRY, *Sec'y,*
J. H. SCHAFER, *Pres., Principal.*
CHAS. E. GREEN, *Surety.*

Signed, sealed and Delivered in the presence of
B. D. DEAN,
G. W. EBNER,
Witnesses.

11 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Chas. E. Green, the surety to the foregoing bond, being sworn, says: That he is a freeholder and resident within the State of California, and is worth the amount in the bond specified over and above

all his just debts and liabilities, exclusive of property exempt from execution.

CHAS. E. GREEN.

Subscribed and sworn to before me this 8th day of December, 1905.

[NOTARIAL SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California, 232 Crocker Building.

My commission expires May 27th, A. D. 1909.

The above and foregoing bond is approved.

W. H. BEATTY,
Chief Justice Supreme Court of California.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Bond filed December 8th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk,*
By I. ERB, *Deputy.*

11½ [Endorsed:] Copy In the Supreme Court of the State of California. Hyman Greenberg, Plaintiff and Respondent, *vs.* Western Turf Association, Defendant and Appellant. Bond on Writ of Error. Goodfellow & Eells, 324 Pine Street, San Francisco.

12 S. F., No. 3376.

In the Supreme Court of the State of California.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

Transcript on Appeal.

W. S. Goodfellow, Attorney for Appellant.
Sullivan & Sullivan, and E. C. Harrison, Attorneys for Respondent.

Filed this — day of October, A. D. 1902.

GEO. W. ROOT, *Clerk,*
By —— ——, *Deputy Clerk.*

13 In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the City and County of San Francisco, State of California.

HYMAN GREENBERG, Plaintiff,
vs.
WESTERN TURF ASSOCIATION, a Corporation, Defendant.

Complaint.

Plaintiff complains of defendant herein, Western Turf Association, a corporation, and for cause of action against said defendant alleges the following:

1. That plaintiff is now and at all times hereinafter men-
14 tioned was a person over the age of twenty-nine years.

2. That defendant herein, Western Turf Association, is now and at all the times herein mentioned was a corporation, duly organized and existing under and by virtue of the laws of the State of California.

3. That said defendant is now and at all of the times herein mentioned was the owner and proprietor of that certain racecourse, situate in the County of San Mateo, State of California, known and designated as "Tanforan Park."

4. That on the 3d day of January, 1900, said defendant was engaged in managing and conducting said racecourse as a place of public entertainment and amusement.

5. That on said 3d day of January, 1900, said defendant caused to be printed, circulated and sold, tickets of admission to said racecourse, which said tickets of admission were required by said defendant to be presented at said racecourse, by persons desiring admission thereto.

6. That on said date, plaintiff acquired by purchase, one of said tickets of admission to said racecourse, and paid for the same the sum of one dollar, the amount for which said defendant sold and
15 caused to be sold tickets of admission on said date to said racecourse.

7. That on said date, plaintiff presented said ticket of admission, purchased by him as aforesaid, at said racecourse, and demanded admission thereto.

8. That on presentation of said ticket at said racecourse on said date, plaintiff was allowed to enter said place and remain there until excluded therefrom, as hereinafter set forth.

9. That on said date, while plaintiff was on said racecourse, and while a large concourse of people was in attendance upon the races then in progress, said defendant, by its agents, servants and employees, assaulted plaintiff with great force and violence, in the presence of said large gathering of people, and then and there seized plaintiff by the throat, body and arms, beat, bruised, wrenched and

wounded plaintiff upon his arms, neck, shoulder, back and other parts of his body, causing the blood to flow from his neck, tore his collar from his shirt, tore his coat, dragged him a distance of several hundred feet in the presence of said people and then and there ejected and excluded plaintiff from said racecourse and refused him admission thereto.

16 10. That by reason of said assault, plaintiff sustained great bodily injuries, suffered great pain of body and mind and suffered great humiliation in his feelings and great degradation and disgrace.

11. That in making said assault upon plaintiff and in ejecting and excluding him from said racecourse, defendant acted maliciously and with wilful oppression towards plaintiff.

12. That defendant made said assault upon plaintiff and ejected and excluded him from said racecourse, without any cause or provocation whatever on the part of plaintiff.

13. That at the time said assault was made and plaintiff was ejected and excluded from said racecourse, as aforesaid, he was not under the influence of liquor, nor guilty of boisterous conduct nor was he a person of lewd or immoral character.

14. That by reason of the premises, plaintiff has sustained damages in the sum of $10,000.

Wherefore, plaintiff prays judgment against said defendant for said sum of $10,000, and $100 in addition thereto, for being refused admission to said racecourse, contrary to the provisions of an act of the Legislature of the State of California approved March 23, 1893, entitled "An Act making it unlawful to refuse admission to

17 places of amusement."

Dated June 7, 1900.

SULLIVAN & SULLIVAN AND
E. C. HARRISON,
Attorneys for Plaintiff.

(Duly verified)

[Endorsed:] Filed June 7, 1900.

Amended Answer.

[Title of Court and Cause.]

Now comes the defendant, and for its amended answer to the complaint of plaintiff herein,

Denies that the defendant is now, or at all or any of the times mentioned in said complaint was, the owner or proprietor of the racecourse therein referred to; but admits that it is and was at said times the lessee thereof and in possession thereof.

This defendant denies that on the date in plaintiff's complaint mentioned, or at any other time, or while the plaintiff was on the racecourse in said complaint referred to, or while a large concourse of people was in attendance upon the races then in progress, or

otherwise, this defendant by itself, or its agents, servants or employees, or any of them, or at all, assaulted the plaintiff with great or any force or violence, or at all, in the presence of said large
18 gathering of people, or otherwise, or did then or there, or at any time or place, seize plaintiff by the throat, body or arms, or beat, bruise, wrench, or wound the plaintiff upon his neck, arms, shoulder, back or other parts of his body, or otherwise, or cause the blood to flow from his neck, or otherwise, or tear his collar from his shirt, or tear his coat, or drag him a distance of several hundred feet, or at all, in the presence of said people or otherwise, or then or there, or at any time or place, eject or exclude the plaintiff from the said racecourse.

And this defendant denies that by reason of said alleged or any assault, plaintiff sustained great or any bodily or other injuries, or suffered great or any pain of body or mind, or suffered great or any humiliation in his feelings, or degradation or disgrace,

And denies that in making said or any assault upon the plaintiff, or in ejecting or excluding him from said racecourse, defendant acted maliciously or with willful or other oppression towards the plaintiff, or that defendant made said or any assault upon the plaintiff or ejected or excluded him from said racecourse without any cause or provocation whatever on the part of the plaintiff, or at all.

19 And denies that by reason of the premises in said complaint stated, or otherwise, or at all, plaintiff has sustained damage in the sum of ten thousand (10,000) dollars, or any other sum.

And for further answer this defendant says that at the time in plaintiff's complaint mentioned, and for a long time prior thereto, this defendant was and had been engaged in managing and conducting the racecourse in said complaint referred to. That on the 3d day of January, A. D. 1900, and for a long time prior thereto this defendant had forbidden the plaintiff to enter upon or remain upon the said racecourse; that the plaintiff nevertheless on the said day entered upon the said racecourse and remained thereon without the permission or consent of this defendant, but contrary thereto, as said plaintiff well knew. That upon being discovered upon the said racecourse, the said plaintiff was required by certain peace officers to retire from the said racecourse, and was offered repayment of the amount which he had paid for admission thereto, but that the plaintiff refused to leave the said racecourse and that the said officers thereupon ejected and removed the plaintiff therefrom, using no more force than was necessary therefor.

And this defendant nevertheless alleges that the said peace officers in so ejecting and removing the said plaintiff were not the agents, servants or employees of this defendant, nor acting under its
20 instructions or in its behalf, but on the contrary that this defendant had theretofore instructed the said officers not to eject or remove the plaintiff or any other person who had gained access to its said racetrack, and that in ejecting and removing the said plaintiff on said day, the said officers were violating the wishes and instructions of this defendant.

Wherefore, defendant prays to be hence dismissed with its costs.

CHAS. F. GARDNER,
D. E. ALEXANDER,
Attorneys for Defendant.

W. S. GOODFELLOW, *Of Counsel.*

(Duly verified.)

[Endorsed:] Filed December 14, 1900.

Verdict.

[Title of Court and Cause.]

In Open Court, December 19, A. D. 1900.

We, the jury in the above-entitled cause, find a verdict in favor of the plaintiff and against the defendant, and assess the dam-
21 ages in the sum of one thousand dollars ($1,000.00).

FRANK MULTNER, *Foreman.*

Judgment.

[Title of Court and Cause.]

This cause came on regularly for trial, Messrs. Sullivan & Sullivan and E. C. Harrison appearing as counsel for the plaintiff, and Messrs. Gardner & Alexander and W. S. Goodfellow for the defendant.

Thereupon a jury of twelve persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were duly sworn and examined, and certain documentary evidence introduced.

Whereupon, after hearing the evidence, the arguments of counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and being called all answered to their names, and then rendered the following verdict, which was accepted by the Court, and entered on the minutes, as follows:

We, the jury in the above-entitled cause, find a verdict in favor of the plaintiff and against the defendant, and assess the dam-
22 ages in the sum of one thousand dollars ($1,000.00).

FRANK MULTNER, *Foreman.*

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that Hyman Greenberg, plaintiff, have and recover from Western Turf Association, a corporation, defendant, the sum of one thousand ($1,000.00) dol-

lars, with interest thereon at the rate of (7) per cent. per annum from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $91.00.

Judgment recorded December 20, 1900, Book 55, page 578.

Notice of Intention to Move for a New Trial.

[Title of Court and Cause.]

You will please take notice that the defendant in the above-entitled action intends to and will move the above-named Court for a new trial therein, and to set aside the verdict of the jury heretofore rendered therein, upon the following grounds:

23 1. Insufficiency of the evidence to justify the said verdict;

2. That said verdict is against law;

3. Errors in law occurring at the trial and excepted to by the defendant.

And said motion will be made upon a bill of exceptions.

Yours etc.,

CHARLES F. GARDNER,
D. E. ALEXANDER,
Attorneys for Defendant.
W. S. GOODFELLOW,
Of Counsel.

Dated February 2, 1901.

To the plaintiff in said action, and to Messrs. Sullivan & Sullivan and Edward C. Harrison, Esq., Attorneys for plaintiff.

[Endorsed:] Filed February 2, 1901.

Bill of Exceptions.

[Title of Court and Cause.]

Be it remembered that this action came on regularly for trial before the Court and a jury duly empaneled; whereupon the following proceedings were had:

24 The Plaintiff, being called as a witness on his own behalf, testified:

I am employed at present on The Bulletin newspaper Before the third of January of this year I was publishing my own paper. I reside at No. 1129 Buchanan street, in this city, with my parents, whom I support. Tanforan Park is situated just below the line between San Francisco and San Mateo counties. On the third of January, 1900, I purchased a ticket of admission to the Tanforan racecourse. I was admitted to the Park with the ticket which I paid for. After I had been admitted I was walking up to the judges' stand,

talking with several people and officials of the racetrack and several of the officials congratulated me upon being on the track; and the first thing I knew, as I had my back towards the crowd, several officers grabbed me and ejected me with force. The officers were Green and Newman. They grabbed me, and somehow they pulled me away and dragged me through the crowd. One of them had grabbed me behind my neck and tore my collar; and they pulled me out in front of thousands of people and everybody hollering; and I was dragged, I guess, about 200 feet outside of the track. There was racing going on that day. A big crowd was present. There were about three or four thousand people there. When the officers grabbed me and dragged me in front of the people I was talk-
25 ing to Mr. Bigelow, sporting editor of The Bulletin, and Mr. Powers, one of the officials. We were in the act of shaking hands.

(Here the plaintiff identified the coat which he had worn on the day referred to, and testified:)

The condition of the coat was all right before I was assaulted. It was torn in the collar. I was dragged around. Two big officers dragged me through the ring, and I had my hand wrenched, and somehow they tore my coat and bled my neck, cut my neck with their finger nails. This is the collar (producing collar) which I had on that day.

(Coat and collar introduced in evidence as exhibits.)

After the assult on the third of January, I met Mr. Frederick Green, the secretary of the defendant, at the Palace Hotel. I showed him my condition and informed him of the fact of the assault. I showed him my collar and torn coat and told him the way they had treated me. After I was ejected from the grounds I was dazed. The crowd surrounded me, and I was bleeding from my neck. I felt the effects of that assault quite a while.

Cross-examination:

I had previously on a great number of times sought to gain
26 admission to the Park, and had been refused. I had been about twenty-five times and had been refused admission, after having bought a ticket. The secretary of the Western Turf Association had told me I would not be admitted to the track. But on the second of January I was told it would be all right to go on the track. A letter was sent to me by Dr. Wetherly. I was not admitted for twenty-five times before the assault. Then on the day before I was assaulted they told me to go out there.

Q. Who told you?

A. A gentleman connected with Mr. Green's office. He acted as confidential secretary. He was employed there. He was not a friend of mine. I cannot say what his position was. He was around the office.

Q. Mr. Green, the secretary, had told you that you would not be admitted to the track?

A. Yes, sir. If I would not make any "form chart" I would not go on the track. I was publishing a newspaper then.

Q. Mr. Green had never revoked that direction to keep you off the track?

A. He did.

Q. When?

A. About one month after the assault.

Q. Up to the time of the assault he had not revoked it?

27 A. No, sir.

Q. Nor any officer of the corporation?

Objected to by the plaintiff as immaterial.

Objection sustained by the Court.

Exception noted by the defendant.

Q. I suppose that, in this fracas which you had in which your coat was torn and your collar was wrenched off, and you were injured that that was by reason of your resistance?

A. No, sir, I could not resist.

Q. You walked out quietly when the officer told you to?

A. Yes, sir. They grabbed hold of me and pulled me out.

Q. You made no resistance?

A. No, sir. I said to them, "Let me see Mr. Green," and they said, "Damn Green," and they pulled me out.

Q. Did you tell the officers that you would walk out quietly?

A. No, sir; they grabbed me.

Q. Did you not tell them that you had a ticket?

A. Yes, sir.

Q. And that you would stay there?

A. I told them I had a ticket and wanted to see Mr. Green. I don't believe I said I would stay there.

28 Q. You declined to go out when they wanted you to go?

A. No, sir.

Q. You said that you had a ticket and claimed the right to be there?

A. I asked them to let me see Mr. Green, and they grabbed me.

Q. That you would not go out until you had seen Mr. Green?

A. That is so, because Mr. Green told me that I could stay there.

Q. When did Mr. Green tell you that?

A. He swore on the stand that he instructed them not to put me out.

Q. If you had not resisted you would not have suffered injury, would you?

A. No, sir.

Q. It was because you would not go out that you suffered injury?

A. No, sir; they used their force there.

Q. Because you would not go otherwise?

A. I had no chance. I had no chance to talk to them. They grabbed me. They grabbed hold of me and pulled and jerked me out. I had been excluded twenty times from the racetrack before that, by the order of Mr. Green, the secretary of the Western Turf Association, after I had paid my dollar for admission, after

29 presenting my ticket. I was thrown back every time I went to the gate. There was a long line at the turnstile when I

came there, and the officer threw me back and assaulted me. That was Officer Cleary at times, different officers.

Mr. SULLIVAN:

Q. Did you complain to Mr. Green, the secretary, about your exclusion from the track?

Mr. GOODFELLOW: I object to the question as immaterial. We have admitted that defendant excluded him from the track, and we are admitting it now.

Dr. Wetherly told me the day before the assault that I could go on the track. He told me they were sorry, and that everything was all right. He told me both in person and by letter. Dr. Wetherly had something to do with the Western Turf Association. He was in the office of Mr. Green, the secretary.

Q. Was Dr. Wetherly merely a clerk in Mr. Green's office?

A. I could not tell you what he was there. He was connected in some way.

Here it was admitted by the defendant that Dr. Wetherly was a clerk in the office of Mr. Green, the secretary of the defendant.

The defendant moved to strike out the testimony of the plaintiff as to the statement made to him by Dr. Wetherly. The
30 motion was denied by the Court, and thereto the defendant excepted.

E. C. BRIGGS, a witness called for the plaintiff, being duly sworn, testified:

That he was a printer and knew the plaintiff, Hyman Greenberg; that he saw the plaintiff on the third of January, 1900, at the race-track, after he had been excluded therefrom. It was about two o'clock in the afternoon. His appearance and condition were very much disordered. His neck was bleeding and his coat was torn.

The witness identified the coat of the plaintiff, and testified the coat was torn that way that day.

He was bleeding from the neck.

(No cross-examination.)

FREDERICK H. GREEN, a witness called for the plaintiff, being duly sworn, testified:

That he was secretary and manager of the defendant, the Western Turf Association, and had been such secretary and manager since May, 1899, the date of its incorporation. As such manager he had charge of the racecourse at Tanforan Park.

Q. Did you, as manager of the Western Turf Association, employ special officers from Morse's Detective Agency, to be present on the grounds during the races?

31 A. Yes, sir, that was the case on and before January 3, 1900.

Captain Callenden part of the time had charge of those officers, and Captain Green another part of the time. Prior to January 3d

I instructed Officer Callenden to exclude the plaintiff from the racetrack. I cannot say when I gave the instruction. It was probably three or four weeks before the 3d day of January Plaintiff was excluded from the track in pursuance of that instruction up to the 3d of January. The orders continued in force for some time after the 3d of January; I do not know how long.

Q. When Captain Callenden and the other men under him were on the grounds, did he and those other men act under your instruction or direction?

A. The Captain had directions.

Q. He had directions from you?

A. Yes, he had directions from me. When Captain Callenden was absent, Officer Green generally took his place.

Q. And you gave directions to Officer Green as to the management of the grounds, did you?

A. Yes, sir. I will say any special instructions. Officer Green got his general instructions from Morse's agency.

Q. But you gave instructions to Morse's Agency, did you
32 not?

A. Yes, sir; they understood their business. They had been handling that business for years.

Q. When you employed Morse's Agency, you gave them instructions as to what to do upon the ground?

A. They had been handling this business for many years. I do not know that I gave them anything except special instructions.

Q. Did you not frequently give instructions to the men of Morse's Agency upon the grounds as to their conduct there?

A. Possibly through the officer in charge, Captain Callenden.

Q. And to Captain Callenden's men at the gate, also?

A. Yes, sir.

Q. And did Captain Callenden himself at the gate under your instruction exclude the plaintiff from admission to the ground prior to the 3d of January?

A. Yes, sir, I believe they did. They had instructions not to allow him in.

Q. After the 3d day of January, was he denied admission to the grounds—after the day he was assaulted?

A. I think he must have been; yes, sir.

Q Under your directions?

A. Yes, sir.

33 Cross-examination:

Q. Did you give any directions to any of those officers to put the plaintiff out if he got in?

A. No, sir.

Q Did you give them instructions not to put him out?

A. I don't remember whether I did or not in this particular case.

Q. Did you before that day?

A. Yes, sir.

Q Did you tell them not to put him out if he should be admitted?

A. The officers had general instructions not to use force but to

keep plaintiff and others out. (Question repeated). I did. That was the general order.

Q. Did that apply to the plaintiff and to other persons?

A. Yes, sir.

Q. Did you pay those officers, or did Mr. Morse pay them?

A Morse's Agency.

Q. Did you make your bargain with the officers themselves, or with Morse's Agency.

A. I made it through Captain Callenden with the Agency. He was the Captain in charge of the others upon the ground there.

Q. And they were subject to his direction?

34 A. Yes, sir. We made payment to the Agency. And so far as we are concerned we do not know where the men get their pay from. We had no right to employ or discharge them. The arrangement made with the Agency was for them to police the grounds, the same as they had been doing both at Oakland and at Ingleside, to place the requisite number of employees upon the grounds for the purpose of preserving order.

By PLAINTIFF'S COUNSEL:

Q. Did you not at any time order any of his men to exclude or reject people from the grounds?

A Yes, sir. Prior to the day of the exclusion of plaintiff, and after that day.

Q. Were those orders obeyed?

A. Yes, sir, they must have been.

By the COURT:

Q After they got in did they put them out?

Mr. GOODFELLOW: State the rule about that.

A. I instructed Morse's Agency not to use any force excluding people from the grounds that were objectionable; but that they had instructions not to allow them on the ground. I wanted them to use due diligence preventing those people from entering; but I did not care to have a disturbance created by the officers in connection with the track; and in cases where they went to those parties and asked them to get off the ground, and they went without any force

35 being used, it was all right, but where force was necessary I did not want to have any force used.

By PLAINTIFF'S COUNSEL:

Q. There are two classes of people that are denied admission to the track, bad characters and people on the blacklist?

A. I do not know that there are two classes.

Q. There are bad characters that you do eject from the grounds?

A. Yes, sir.

Q. And then other people that are not favored by the concern and whose presence is not desired—is not that so?

A Yes, sir; and there are also others.

Q. Was it not the custom up to the 3d of January, if a person objectionable to the corporation gained access to the grounds, to put them off the grounds?

A. Yes, sir.

Q. And did you not give instructions time and again to the employees of Morse's Agency or to the officers there upon the grounds, to eject those objectionable persons from the grounds?

A. Yes, sir; without force.

Q. But you did give instructions to eject them from the grounds?

A. Yes, sir

36 Q. And you gave instructions to eject them from the grounds after January 3d?

A. Yes, sir.

Q. Do you know how a person could be ejected from the grounds without force?

A. Simply an officer would request them to go outside, and give them back their dollar, or whatever they had paid for admission. I notified the officers, in case parties would not leave the grounds quietly, not to use force; that it was better to let them remain there during the day and be more careful in the future not to admit them within the grounds. I gave those instructions to Captain Cellenden. I did not repeat such instruction to George Green or to Mr. Newman. I probably did also to Mr. Green. I did not see persons excluded from the racetrack before the 3d of January, 1900, by force. I never did see anybody excluded forcibly from the track I heard of the occurrence on my arrival at the city office at the Palace Hotel on that day.

Q. Was it not the custom to put persons off the grounds who were not known to be bad characters because they were not liked by the Association

A. I have no recollection of any persons being ejected from the grounds unless there was good reason for doing so.

37 Answer stricken out for not being responsive.

By the COURT:

Q Whether they did it because you did not like them?

A. No, sir; not because they did not like them.

GEORGE M. WOOD, a witness called for the plaintiff, being duly sworn, testified:

I saw the plaintiff on the 3d day of January at the Tanforan Park. I was in front of the gate and saw him coming out of the door. The officer had just let him go out of the outer gate. His coat was torn; and a little while after I noticed that his neck was cut and bleeding.

The witness identified the coat as that being worn by the plaintiff on that day.

JULES J. CALLENDEN, a witness called for the plaintiff, being duly sworn, testified:

I am the superintendent of Morse's Patrol System. On and prior to the 3d and January I was employed on the racecourse of the de-

fendant. I had anywhere from twelve to twenty men under my control. Officers Newman, Cleary and Green were so employed.

Q. Did those officers have instructions from you to exclude the plaintiff from the racecourse?

A. The instruction was to prevent him getting in, not to allow him to get through the gate. He was excluded from the racecourse before the 3d of January by instruction of the manager of
38 the racecourse I instructed all of my men not to let him in. My instructions were that if he came with a ticket to offer him his money back and tell him he was not allowed upon the track. My men were employed as ticket takers at the gate On and prior to the 3d of January my men received the tickets from the patrons of the racecourse, who were admitted to the racecourse in single file through the turnstiles, and at each of those entrances Morse's men were stationed as ticket takers. The contract between Morse's Agency and the defendant was verbal. It was between myself and Mr. Green personally. Mr. Morse would give me instructions to offer them the service of so many men at so much per day, and I would present that proposition to Mr. Green, the secretary; and I suppose they would act on it. The Morse's Agency receives so much per man employed as policeman upon the grounds. The moneys were paid to me for the Detective Agency. A check was given at the end of the racing season.

Cross-examination:

Mr. Morse is the proprietor of the Agency. The men were paid by him Most of the men are employed by the month. We furnish them to the racetrack at so much per day. When I spoke of
39 excluding persons from the track I meant preventing them getting in, not putting them out after they got in.

Q. Did you have instructions to put Mr. Greenberg out of he got in?

A. No, sir; on the contrary, Mr. Greenberg got in a day or two before that, and I reported it to Mr. Green, the secretary, and he said: "You want to have the men be a little more careful; let him stay in when he is, but I do not want him to get in again."

Q. Did you have instructions from defendant to put Mr. Greenberg out at all?

A. Not if he got in; no, sir. My instructions were to keep him from getting in. I never had instructions to put him out.

Q. How was he put out that day?

A. I don't know. For some reason I did not go to the track, and Mr. Morse sent Mr. Green in my place—George Green.

By PLAINTIFF'S COUNSEL:

Q. Did you not eject persons from that racecourse before the 3d of January?

A. I have ejected pickpockets and taken them out and locked them up.

Q. Have you not taken out other people who never were denied admission to the racecourse?

A. At the Oakland track; yes, sir; not at the Tanforan
40 Park, that I know of. The Oakland track is not run by the Western Turf Association. They have different instructions over there. There the instructions are to throw out any one who is not allowed in. The instructions are directly opposite over here at the Tanforan. In the Oakland track all undesirable characters or anybody ruled from the track are thrown out without ceremony. If they get in, we put them out very quickly.

The plaintiff thereupon stated that he had other witnesses, including Mr. Bagley, the sporting editor of The Bulletin, and Mr. Powers, who witnessed the assault, and who would testify substantially to the same facts testified to by plaintiff in relation to his being ejected from the track. And it was admitted by the defendant that if the said witnesses were present they would so testify.

H. L. SCHMITZ, a witness produced, sworn and examined on behalf of the plaintiff, testified as follows:

I am a bookkeeper employed in The Bulletin office The plaintiff is also employed by The Bulletin. I have known him for a number of years and knew him when he worked in The Call office some years ago. On the 3d of January, after he was excluded from the racetrack at Tanforan Park, I remember seeing him and remember his appearance. He came into The Bulletin office between five
41 and six o'clock, and his collar was covered with blood, and his condition was so ruffled up I thought he had been in a tussle. I noticed the condition of his coat. The coat shown to me is in a similar condition to which it was in that day; that was the coat that he had on that day, as far as I can remember. His collar was spotted with blood. .(The coat shown the witness was the coat already offered in evidence by plaintiff.)

Here the plaintiff rested.

The defendant then called as a witness HENRY NEWMAN, who, being sworn, testified:

That he is one of the employees of the Morse's Agency and is one of the persons who ejected the plaintiff from the race track on the 3d day of January.

Q. State what occurred before you put him out, your conversation with him about going out.

A. Captain Green and I went up to Mr. Greenberg and spoke to him and told him he would have to go out. He said, "I have bought my ticket, and I am going to stay in." Captain Green said, "You have to go out." Mr. Greenberg said, "I won't go out; you have got to put me out." Then Captain Green took hold of him and I assisted him.

Q. Did Captain Green say anything to him after that before you took hold of him?

42 A. He said he would refund him the dollar. Mr. Greenberg said, "I bought a ticket." And Captain Green said,

"We will give you your dollar back." Mr. Greenberg said, "I don't want my dollar back." Then we went on out with him and along by the bar, as we started, he pulled back all of the time, and I said, "Why don't you go along? Why do you want to move so slow?" And he said, "I want witnesses." And he kept on pulling back and resisting. And Captain Green was ahead of me. I had him by the wrist and by the elbow, back. And he kept pulling all of the time. We took him down to the front gate and put him out of the front gate.

Q. I will ask you whether or not you used any more force than was necessary to put him out?

A. No, sir. There was no force used as far as we were concerned. He was doing all of the resisting. He struggled all of the way out.

Cross-examination:

Captain Green and myself are both powerful men, weighing about 225 pounds each. When I first saw the plaintiff he was near the telegraph office. There were quite a number of people there that day. He was standing there talking to some persons. Captain Green told him that he could not stay there, that he would have to go out. I was on his left side and seized him and pinned his
43 arm around that way (illustrating) and he kept pulling back all the time. I don't remember how Captain Green took hold of him. I kept hold of him until he was ejected through the gate. We kept him moving and he kept pulling. Our pull was evidently stronger than his. When Mr. Greenberg says, "you will have to put me out," Captain Green may have said, "well, put goes." Captain Green was there that day in place of Captain Callenden. He had charge of Morse's men upon the grounds, and gave directions to them upon the grounds. I was one of the regular details from Morse's Agency on the race course that day and had been there for some time before, also afterwards. I was detailed there during the racing season of 1899-1900.

Q. Why did you and Captain Green put your hands upon Mr. Greenberg and use force in ejecting him from the grounds?

A. As I said before, we heard that he was inside, and naturally we knew that the man is not allowed inside, and if he is seen inside by any of us we naturally ask him or take him out.

Q. You did that before, did you not, with other people, jockeys, owners and trainers?

A. Yes, sir, those who have been ruled off, or who had been denied the privilege of the track.

44 Q. That was the custom of Morse's men to use force putting them out of the grounds?

A. Not force—nothing only what was necessary.

Q. It was the custom, then, for you and Morse's men to use the necessary force putting those people who have been forbidden the use of the track, or access to the track, off the grounds?

A. Where they did not go of their own free will, and it was necessary, yes, sir.

Q. And that was your custom while there?

A. Nothing out of the ordinary.

Q. Where persons who had been forbidden access were on the grounds, it was your custom to use necessary force to put them off the grounds—the force required to put them off if they objected?

A. We asked them to go, and where they would not, hands were laid upon them, where they resisted we took hold of them, where we knew they were not allowed upon the track.

Q. How often did you see that done upon the Tanforan Park, where persons were forcibly ejected from the grounds who refused to leave.

A. I cannot say.

Q. Was it not a matter of daily occurrence?

A. No, sir.

Q. Of weekly occurrence?

A. Hardly.

45 Q. About how often during a season did that occur?

A. I would say whenever it was required.

Q. Whenever a person forbidden access refused to go, you always put them off with force, did you not?

A. Not with force.

Q. With the requisite amount of strength?

A. No, sir. Nothing that was unnecessarily required.

Q. But what was necessary you did do, where he resisted?

A. Yes, sir.

Q. Did you, when you were accustomed to taking persons from the grounds, subsequently make a report to the Captain in charge of the policemen there?

A. Where I or some other officer did it without the knowledge of the Captain, yes, sir.

Q. Did you make a report that day of the forcible ejection of the plaintiff, Hyman Greenberg, from the grounds?

A. Captain Green, the Captain in charge in place of Captain Callenden, was there with me then; therefore I had no occasion to make any report.

Q. You and Captain Green had charge of all of Morse's patrolmen there that day?

A. Yes, sir.

46 Q. Did you ever receive instructions from Captain Callenden or Green as to the amount of force you were to use in ejecting objectionable persons from the track?

A. No, sir; because that was all something that they could not instruct one on.

Q. Did you ever receive instructions from Captain Green or Captain Callenden or anybody at all to eject from the track, in the event of refusal, anybody objectionable?

A. Naturally, where I knew a party was not allowed on the track, if I went to them and asked them to leave, and they did not go; naturally, I would take hold of them and say, "You will have to go out." Then, if they resisted, I would naturally hold on to them, or see that they got outside.

Q. Did you ever receive instructions from Officer Callenden or

anybody else connected with the grounds, to eject from the premises persons who got into the track who were forbidden access to the track.

A. Yes, sir, I have.

Q. You received instructions to put them out of the track if they gained access to the track?

A. Yes, sir.

Q. And that was your understanding and intention, was it not, which you received as one of Morse's men?

47 A. Not the understanding or instruction. Where a party is supposed not to be allowed on the track, if he is in there, we see that he goes out.

Q. That was your instruction, to see that he goes out, or to put him out?

A. To see that he goes out, to ask him.

Q. And if he refuses to go, to put him out?

A. To see that he got out.

Q. That was your instruction?

A. That was the general instruction, but in no particular case.

Q. The general instruction applicable to all cases?

A. Wherever a man is not allowed on the track.

Q. You had general instructions in all cases to see that he was put out of the track?

A. But in each case we generally asked the Captain; told him that so-and-so was on the track, and then the results were according to his instructions.

Re-examination:

I was under the charge of Captain Callenden or Captain Green.

Q. What character of persons were those that were put out?

A. Those that are not allowed on the track.

48 Q. What character of persons were those that were put out? Pickpockets or persons of that character.

A. Pickpockets and men that either have been ruled off, such as owners, trainers and jockeys, or other individuals that might come under the rules of the Jockey Club.

Recross-examination.

Q. Have you not put off of those grounds persons of good character; men who happen to have incurred the displeasure of some of the race course people?

A. I cannot say that.

Q. Don't you know that you have put off of the race course there people of good character and whom you know to be of good character.

A. Lots of men that I have put off I did not know anything about them.

Q. You simply put them out of the track because you were ordered to do so?

A. Yes, sir.

Q. About how often were you accustomed to putting people

forcibly out of the race course, after they had gained admission?
A. I cannot say; that is a hard matter to say. Whenever the occasion required it. I could not tell you how often it was.
49 Q. You put people off that you did not know anything against because you were told to put them off?
A. I had instructions.

JULES J. CALLENDEN, a witness for the defendant, being duly sworn, testified:

I heard Mr. Newman, the last witness, testify.
Q. Will you state to the jury what character of persons are those who are put off the track out there at Tanforan?
A. The instructions were to eject nobody who got in. That is, unless it was a pickpocket, or a fight. If there was a fight, we would eject them. Cases of that kind. I cannot recall any case where we ever ejected from the Tanforan. In Oakland it is common. Those were the instructions at Tanforan, not to eject anybody who was inside.

Cross-examination:

Q. If a person was seen in the custody of two police officers being pulled out of the racecourse the inference would be in the minds of the people present that the man was a pickpocket?
A. No, sir, nothing of the kind. We know those characters; and if we catch them in the act of committing crime to take them. It is very seldom that they get in. Officer Newman has been in
50 the employ of the Agency for five or six years. He serves at Tanforan and at the Oakland Park. Officer Green has been in the employ of the Agency eight or ten years. He serves also at both racetracks. He takes my place when I am unable to attend. It frequently occurs that I cannot go.

G. W. GREEN, a witness for the defendant, being duly sworn, testified:

That he was one of the persons who ejected Mr. Greenberg from the track on the 3d of January.
Q. State what conversation you had with him before you ejected him.
A. I was informed that he was upon the track, and I went to hunt for him, and found him near the telegraph office, in conversation with two gentlemen. I said to him, "You know that you have no right in here." He said, "I paid to come in and I am going to stay, and you will have to put me out." And I said, "Put goes;" and I put him out. He made resistance. He pulled back a little. He said he wanted to see his witnesses. And I told him he could see them outside.
Q. State whether or not you used any more force than necessary to put him out.
A. No, sir.

Q. Did you do him any injury?
A. Not that I am aware of.

51 Cross-examination:

When I first saw the plaintiff he was standing between the judges' stand and the telegraph office, quite a long distance from the main entrance or gate to the racecourse. He was talking quietly with two gentlemen when I saw him. He was behaving himself. I said, "You know you have no right to be upon the racecourse." He said, "I have paid my dollar." And I said, "I will pay you your money back." He said, "I won't take it back; you will have to put me off if you want me to go." And I said, "Put goes." And thereupon I put my hands upon him. I took him like this (showing). And when he tried to pull back I had him like this (showing). I pushed him ahead of me to the gate, and Officer Newman assisted me.

Q. Did you keep hold of him until you got to the gate?
A. I think I let go of him when we got to the bottom of the stairs. I did not use him very roughly. He was not used roughly at all.
Q. If you had handled him roughly there wouldn't have been much left of him?
A. I don't know; I could not tell you that. My instructions were not to let him upon the track. I received my instructions from Captain Callenden.

52 Q. Did Captain Callenden tell you to eject from the premises persons who had gained access to the premises who had no right to go there or enter there?

A. I will explain that. My instructions were to keep them off the track. I am frequently substituted for Cap-ain Callenden; I take his place on the track; and it is my duty to give instructions to the men under me what to do. Also in relation to preserving order and excluding people from the track. On that day I believe I met Officer Newman on my way, after I had received information that Mr. Greenberg was upon the track, and that I told him that I was going after him. He came with me.

Redirect examination:

Q. Did you have instructions to put him off the track from anybody?
A. No, sir.
Q. State how you happened to put him off.
A. I had been to the Oakland track that week and the Captain was sick, and I had received instructions over there to take him off the track, and I *put* him off the track there in Oakland; and to my idea the rule worked in both courses, and I put him off the Tanforan. I took it on my own responsibility to do it. I did not receive

53 instructions from Captain Callenden or anybody else to do so.

HENRY NEWMAN, being recalled, testified as follows:

By the COURT:

Q. Did you misunderstand the question and wish to correct your answer?

A. Yes, sir.

The COURT: Go ahead.

The WITNESS: In regard to ejecting persons from the track, I have at Oakland quite a number of times; but at Tanforan Park never before this case. This is the only case that I ever ejected anybody from the Tanforan.

Q. Your testimony before related to the Oakland track?

A. Yes, sir.

Cross-examination:

Q. Do you mean what you said to-day when you informed the jury that you had frequently ejected people from the Tanforan track who had been forbidden access to the track—did you mean what you said?

A. The question was whenever the occasion required it. But at the Tanforan never; but at the Oakland track.

Q. This morning you testified that on several occasions
54 before the 3d of January you had ejected from the Tanforan track people who had been denied access by the management—is that the fact?

A. Not at Tanforan; no, sir. My recollection is not that I testified at Tanforan of any ejection but this one case.

Q. Have you discussed this matter with Captain Callenden since?

A. No, sir; only I was asked the question. I have not discussed the testimony I gave to-day with Captain Callenden, nor did I speak to Officer Green about the testimony I gave to-day.

Q. Did Captain Callenden tell you you had made a serious mistake in your testimony?

A. No, sir; I understood him that whenever the occasion required it; not designating Tanforan or Oakland.

Here the testimony was closed.

The Court then charged the jury as follows:

GENTLEMEN OF THE JURY: I give you the following instructions, requested by plaintiff:

1. I will now read to you the act of the Legislature entitled, "An Act making it unlawful to refuse admission to places of amusement.

"SECTION 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either,
55 of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous

conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

"SECTION 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this act, is entitled to recover from the proprietor, lessee or their agents or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

"SECTION 3. This act shall take effect immediately."

3. If you should find in favor of the plaintiff, then, in determining the amount of plaintiff's actual damages, it is proper for you to consider the pain inflicted, if any, and also the humiliation, degradation and disgrace, if any, caused by the manner and circumstances in and under which the violence was used.

56 6. The defendant is a corporation. A corporation can act only through its agents and employees.

I also give you the following instructions, requested by defendant:—

2. If you believe that the special officers by whom the plaintiff was ejected from the racetrack were the employees of H. N. Morse, or the Morse Agency, and not of the defendant in this action, and that said special officers, in ejecting the plaintiff, acted without authority or instruction from this defendant, the plaintiff cannot recover, and your verdict must be in favor of the defendant.

3. The defendant is not liable for acts done by said special officers without its authority or instructions, or contrary to its directions.

9. In this action the plaintiff is not entitled to recover exemplary or punitive damages, but can only recover, if at all, the damages actually sustained by him.

(Oral Charge.) In addition to what has been stated here in these few instructions which I have read to you, I will say: It is claimed in the complaint here that the defendant, the Western Turf Association, did these acts and committed the alleged injuries of which complaint is made. You are to determine from the evidence

57 in this case whether that allegation is true or not. And in determining that question you will have to consider and decide what the relations were between these so-called special officers and the corporation defendant.

If you should find that the expulsion of the plaintiff from the track of the Association—because it is conceded that he was expelled—if you should find that the expulsion was performed by the so-called special officers, without the knowledge or notice, or without the authority or approval of the defendant corporation, then the corporation would not be responsible for such act. But if you should find that these so-called special officers were invested with authority on the part of the corporation, express or implied, to forcibly remove or expel certain persons from the track, and in consequence of such authority did expel the plaintiff from the track, then, in the view that I take of the law, he would be entitled to recover damages at your hands.

If you should conclude that plaintiff is entitled to recover damages, I will instruct you that this is not a case for exemplary damages. Perhaps it may be well for me to tell you what the term "ex-

emplary damages" means. It will sometimes happen that a man is injured in his person. We will say that his leg is broken through the negligence of another, and he brings a suit to recover
58 damages for the injuries sustained in consequence of the negligence, sues because he has had his leg broken through the negligence of another, and it may appear from the evidence that the negligence of the other person was of a willful character, or it may appear that the injury was in part occasioned by the malice or intentional design of the defendant. In such a case the law will permit the jury to consider two classes of damages and in their discretion to award one or both. They may first say how much should the man be compensated for the pain, injury and expense he has been put to in consequence of his broken leg. What damages has he actually sustained? Those are called compensatory damages, damages which are just sufficient in amount to make him even in money for the injury received; but, where in addition to the negligence this malicious and evil spirit exists, or malicious design, the jury may say: "We think perhaps $500 would compensate him for "his physical injuries; but, this act being wicked and malicious "and wrongful, we will, by way of exemplary damages, add to our "verdict three, four, or five hundred dollars more"—by way of illustration—"and will give a verdict against the man for $1,000;
"$500 because we think plaintiff has sustained that amount
59 "of injury, and $500 more to punish defendant by way of "example."

This is a case where you cannot give any damages except compensatory damages, if you give any; damages actually sustained. Because, if you should find that these special officers were the agents and representatives of the defendant corporation, and did commit an act of unnecessary violence in the expulsion of the plaintiff from the track; if you should find that in doing that act they were actuated by malice or willful intention to injure or maltreat him, you could not award damages in the nature of exemplary damages against the defendant corporation on that account.

If such a state of affairs existed, and a suit had been brought by plaintiff against the men who actually expelled him you could. You could say that these men did such and such things, and you could award both kinds of damages, but in this case the suit is against a corporation, and therefore, in this case no such damages can be awarded or even considered. Therefore, if you think that plaintiff is entitled to recover, you can, in the language of the statute, award him, in my opinion, only actual damages. In my view of this case, you cannot award him $100, to which reference has been made, by way of penalty; under the statute you can only award actual damages.

60 If, therefore, you should find from the evidence in the case that plaintiff is not entitled to recover, has not made out his case by a preponderance of evidence, you should find for defendant. If you find he has made out his case by a preponderance of evidence and is entitled to recover a verdict, you can award him only actual damages. And, in the award of such damages, you are to treat each party with exact justice and fairness; to determine the

question impartially and fairly, and not be influenced by prejudice on the one hand nor by sympathy or bias upon the other; and the law provides that damages in all cases must be reasonable in amount.

The defendant excepted to the charge of the Court in leaving it to the jury to determine whether or not the special officers were the agents or employees of the defendant, because there was no evidence upon which the jury could base a verdict that they were; and also excepted to that portion of the charge which left it to the jury to determine whether these special officers had any authority or instruction, express or implied, from the defendant to eject this plaintiff from the track, because there was no evidence to show that they had, and no evidence upon which the jury could base a finding to that effect.

The defendant also excepted to the action of the Court in
61 giving instructions 1, 3 and 6, above referred to, at the request of the plaintiff.

The defendant also excepted to the action of the Court in refusing to give the instructions hereinafter referred to, requested by the defendant, numbered 1, 4, 5, 6, 7 and 8, and excepted to the action of the Court in modifying the instruction hereinafter referred to, requested by the defendant and numbered 3.

The following are the said instructions numbered 1, 3, 4, 5, 6, 7 and 8:

I.

You are instructed to render a verdict in favor of the defendant.

III.

If you believe that the defendant made a bargain with H. N. Morse or the Morse Agency to furnish to it a number of special officers, and that the said special officers were furnished by the said Morse or the Morse Agency, and their compensation was paid by the said Morse or the Morse Agency and the said officers were under the direction and superintendence of the Captain employed by the Morse Agency, the said Captain and the said officers were not the servants or employees of the defendant, and the defendant is not liable
62 for acts done by them without its authority or instructions or contrary to its directions.

IV.

A ticket of admission to the racecourse entitles the holder to entrance upon the course with the permission of the proprietor, but such permission may afterwards be revoked, and if such permission be revoked and the holder of the ticket be requested to remove from the racecourse and refuses to do so, he becomes a trespasser and may be ejected without the use of more force than is necessary therefor.

V.

I instruct you that the act of the Legislature of California of the year 1893 which has been referred to is unconstitutional and void.

VI.

I instruct you that the act of the Legislature of 1893 referred to has no application to this case and must be disregarded by you.

VII.

I instruct you that if the plaintiff was on and for some time prior to the 3d day of January, 1900, forbidden admission to the track of the defendant, he could not acquire a right of admission
63 by purchasing a ticket from the railroad company or other ticket selling agency of the defendant, if such ticket were so sold to him without knowledge on the part of the person or agency selling the same that the plaintiff was forbidden entrance to the track.

VIII.

I instruct you that if the plaintiff, before being ejected from the track, was notified to leave the same and was offered back the money which he had paid for his ticket, the plaintiff should have left the track voluntarily, and if no more force than necessary was used in ejecting him, he cannot recover in this action.

The jury thereafter returned a verdict in favor of the plaintiff for the sum of $1,000.

The defendant now specifies the following as the particulars in which the evidence is insufficient to justify the said verdict:

I.

The evidence is insufficient to show that the plaintiff sustained damage in the sum of $1,000, or any other sum.

II.

The evidence is insufficient to show that the special officers by whom the plaintiff was ejected from the track were the em-
64 ployés or agents of the defendant in this action, or that said special officers, in ejecting the plaintiff, acted with authority of, or under instructions from, the defendant.

III.

The evidence is insufficient to show that the said special officers were not the agents, servants and employés of H. N. Morse, and not of this defendant.

IV.

The evidence is insufficient to show that the plaintiff had any right to enter upon the racetrack of the defendant or to remain thereon; and is sufficient to show that, if the plaintiff ever had any such right, the same was not revoked before he was ejected from the said track.

V.

The evidence is insufficient show that the defendant, by itself, its agents, servants or employés, or any of them, assaulted the plaintiff with great or any force or violence, or at all, or committed any of the grievances alleged in the complaint, or ejected or excluded him from its racecourse.

65 VI.

The evidence is insufficient to show that the defendant acted maliciously, or with wilful or other oppression, towards the plaintiff.

The foregoing bill of exceptions is correct and may be settled and allowed.

Dated Jan. 4th, 1902.

SULLIVAN & SULLIVAN,
Attorneys for Plaintiff.
W. S. GOODFELLOW,
Attorney for Defendant.

The foregoing bill of exceptions is hereby settled and allowed.

Dated January 9, 1902.

JOHN HUNT, *Judge.*

Endorsed: Filed January 9, 1902.

Order Denying Motion for a New Trial.

[Title of Court and Cause.]

WEDNESDAY, *August* 13, 1902.

In this action the defendant's motion for a new trial herein having been heretofore submitted to the Court for consideration and decision, and now the Court having fully considered the same, it is
66 ordered that the said motion be, and the same is hereby, denied.

Notice of Appeal from Judgment.

[Title of Court and Cause.]

You will please take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of the State of California from the judgment therein entered on the 20th day of December, 1900, in favor of the plaintiff in said action and against the said defendant, and from the whole thereof.

Yours, etc.,

CHARLES F. GARDNER,
D. E. ALEXANDER,
Attorneys for Defendant.
W. S. GOODFELLOW,
Of Counsel.

To the plaintiff in said action, and to Messrs. Sullivan & Sullivan and Edward C. Harrison, attorneys for plaintiff.

Dated, February 16, 1901.

Due service of a copy of the within is hereby acknowledged
67 this 16th day of February, A. D. 1901.

SULLIVAN & SULLIVAN,
Attorneys for Plaintiff.

[Endorsed:] Filed Feb. 16, 1901.

Notice of Appeal from Order Denying Motion for New Trial.

[Title of Court and Cause.]

Take notice that the defendant in the above-entitled action hereby appeals to the Supreme Court of the State of California from the order denying its motion for new trial therein given, made and entered in the said Superior Court on the 13th day of August, 1902, in favor of the plaintiff in said action, and against said defendant, and from the whole of said order.

Yours, etc.,

W. S. GOODFELLOW,
Attorney for Appellant.

To the Clerk of said Superior Court, and Messrs. Sullivan & Sullivan and E. C. Harrison, attorneys for respondent.

Dated this 18th day of September, A. D. 1902.

Service and receipt of a copy of the within notice of ap-
68 peal, after filing, is hereby admitted this 18th day of September, 1902.

SULLIVAN & SULLIVAN,
E. C. HARRISON,
Attorneys for Respondent.

[Endorsed:] Filed September 18, 1902.

Certificate and Stipulation of Attorneys.

[Title of Court and Cause.]

It is hereby stipulated and certified that the foregoing Transcript contains a correct copy of each of the following papers on file and of record herein with the Clerk of the Superior Court of the State of California in and for the City and County of San Francisco, and of the several endorsements thereon, to wit: Complaint, Amended Answer, Verdict, Judgment, Notice of Intention to Move for a New Trial, Bill of Exceptions, Order Denying Motion for a New Trial, Notice of Appeal from Judgment, and Notice of Appeal from Order Denying Motion for a New Trial; and that said papers will
69 constitute the record on file herein; and that undertakings on appeal in due form have been properly filed herein.

Dated October 27, 1902.

SULLIVAN AND SULLIVAN,
Attorneys for Plaintiff and Respondent.

____ ____,
Attorney for Defendant and Appellant.

70 Due service of the within is hereby admitted this 27 day of October, 1902.

SULLIVAN AND SULLIVAN,
Attorneys for Respondent.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Transcript filed October 27th, 1902, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk,*
By I. ERB, *Deputy.*

71 In the Supreme Court of the State of California.

S. F. No. 3376.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

Certificate.

I, the undersigned, Chief Justice of the Supreme Court of the State of California, do hereby certify to the Honorable the Supreme Court of the United States, that the above entitled cause was submitted to the Supreme Court of California for decision upon printed briefs and without oral argument.

In the brief for appellant, at page 11 thereof, appears the following:

"The statute of March 23rd, 1893, is in contravention of the Fourteenth Amendment to the Constitution of the United States, and this defendant now specially sets up and claims rights, privileges and immunities under the said fourteenth amendment."

In the appellant's reply brief, on page 6 thereof, appears the following:

"This statute is an unwarranted interference with the rights of the Association to conduct its business in its own way, and to admit to its private grounds those only whom it pleases."

And in the appellant's reply brief, on pages 7 and 8 thereof, appears the following:

This statute does not seek to impress upon theaters, race tracks, etc., a use in favor of the public generally. It is in favor of those members of the public only who have purchased tickets, and the proprietor is left free to sell or refuse to sell tickets to whom he pleases. The effect of the statute is to make an exception
72 of these particular licenses and to declare them to be irrevocable. It is special and class legislation, and limits the right to make contracts.

Gibbs *vs.* Talley, 133 Cal., 377.

The appellant here again pursuant to the act of Congress touching the jurisdiction of the Supreme Court of the United States, specially sets up and claims rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States; it asserts that by this statute the State of California seeks to abridge the privileges and immunities of citizens of the United States, and to deprive them of liberty and property without due process of law, and to deny to them, being within its jurisdiction, the equal protection of the laws."

In witness whereof, I have hereunto set my hand this 11th day of December, A. D. 1905.

Dec'r 11, 1905.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Certificate filed December 11th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By I. ERB, *Deputy*.

73 [Endorsed:] Copy. In the Supreme Court of the State of California. Hyman Greenberg, Plaintiff and Respondent, *vs.* Western Turf Association, Defendant and Appellant. Certificate. Goodfellow & Eells, 324 Pine Street, San Francisco.

74 S. F. No. 3376. In Bank. October 12, 1905.

HYMAN GREENBERG, Plaintiff and Respondent,
v.
WESTERN TURF ASSOCIATION, Defendant and Appellant.

ACTION FOR DAMAGES—EXCLUSION FROM RACETRACK.—In an action for damages for being excluded from a racetrack, where the evidence is conflicting on the question as to whether the parties who excluded plaintiff were employés of defendant, the court properly submits the matter to the jury for determination.

ID.—ID.—POLICE POWER OF STATE.—A state has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, places of public amusement, etc.

ID.—ID.—ID.—CONSTITUTIONALITY OF ACT OF MARCH 23, 1893.—The act of March 23, 1893, providing that a party excluded from any place of amusement, among other places, race-

tracks, may recover his actual damages and the penalty therein provided, is a valid and constitutional exercise of police power. It is not at all as having to do with civil rights that this act is upheld.

Appeal from the Superior Court of the City and County of San Francisco—John Hunt, Judge.

For Appellant—W. S. Goodfellow; Goodfellow & Eells; Charles F. Gardiner; D. E. Alexander.
For Respondent—Sullivan & Sullivan; E. C. Harrison.

This case is between the same parties and similar to that of Greenberg *v.* Western Turf Association (140 Cal. 357). Plaintiff recovered judgment before a jury, and from that judgment and from an order refusing its motion for a new trial, defendant appeals.

Defendant first complains of the court's refusal to instruct the jury to render a verdict in its favor, the contention herein being that upon the undisputed facts, Green and Newman, who ejected the plaintiff, were not employés of the defendant, but of Mr. Morse, proprietor of the Morse Detective Agency, and that as Morse was an independent contractor, the doctrine of *respondeat superior* should have been applied to Morse, and not to the defendant. The evidence, however, upon the question was conflicting, and the court properly submitted the matter for determination to the jury.

It is next contended that the act under which plaintiff sought his recovery is unconstitutional, and in this regard it is insisted that the construction put upon the act in the 140 Cal. is erroneous. Herein appellant contends that the statute is in contravention of the XIV amendment to the constitution of the United States, and section 1 of the declaration of rights of the state constitution, and this court is asked to reconsider the construction which heretofore it has put upon the act. The argument of appellant in this respect seems to be that as, at common law, the purchaser of a ticket to a place of amusement held only a revocable license, and the proprietor of such a place of amusement could either refuse the holder of the ticket admission, or eject him after admission, not being responsible in tort, but merely in contract for the price of the ticket, and the necessary expenses incurred by the purchaser, no subsequent legislation by the state can modify this common law rule except in one particular, and that is, that the exclusion cannot be by way of race discrimination, and because of "race, color, or previous condition of servitude;" that as the act in question is not designed to meet this condition, or to effectuate this end, it is an unwarranted invasion of the rights which the defendant enjoyed before the passage of the act under the rule as it existed at common law. If the right of state legislatures to pass an act such as this rested upon the proposition enunciated, the acts themselves would be of no value, for, as pointed out in the note to McCrea *v.* Marsh (71 Am. Dec., page 479): "The states might pass such laws, but if a ticket to a theater is but a revocable license, they would be of little effect; as, if the theater proprietor desired to ex-

clude colored persons he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race, color, or previous condition of servitude.'" The truth of the matter is that the right of the state rests upon no such flimsy foundation. It is based upon its fundamental right, when not acting in contravention to its constitution or to the constitution of the United States, to modify the common law. As is said in 1 Hughes 541: "A state has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, etc." As pointed out in Dillon, 1 Municipal Corporations, 4th edition, section 357: "Charters not infrequently confer upon the corporation the power to 'license and regulate' or to 'license, regulate and tax' certain vocations and employments and to 'tax and restrain' or 'prohibit' exhibitions, shows, places of amusement and the like, and, unless there is some specified limitation on the authority of the legislature in this respect, such provisions are constitutional." The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act in question was upheld in the 140 Cal., and its constitutionality is here again affirmed.

The judgment and order appealed from are therefore affirmed.

HENSHAW, *J.*

We concur:

McFARLAND, *J.*
LORIGAN, *J.*
SHAW, *J.*
ANGELLOTTI, *J.*
VAN DYKE, *J.*

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed October 12th, 1905, in the above entitled cause, as shown by the records of my office.

Witness my hand and the seal of the Court, this 11th day of January, A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By GEO. H. S. DRYDEN, *Deputy*.

75 Certified Copy.

In the Supreme Court of the State of California.

S. F. No. 3376. Bank.

HYMAN GREENBERG, Resp.,
vs.
WESTERN TURF ASSOCIATION, App.

On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by Henshaw J., we concur; McFarland J., Lorigan J., Shaw J., Angellotte J., Van Dyke J.

Whereupon, it is ordered, adjudged and decreed by the Court that the Judgment and Order of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same are hereby affirmed.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment on page 430 Judgment Book entered in the above entitled cause on the 12th day of October, 1905, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 19th day of January, A. D. 1906.

[Seal Supreme Court of California.]

FRANK C. JORDAN, *Clerk*,
By J. ERB. *Deputy*.

76 [Endorsed:] Certified Copy. S. F. No. 3376 In the Supreme Court, State of California. Judgment. Hyman Greenberg, Resp. *vs.* Western Turf Association, App.

Clerk's Costs	$
Paid by Appellant	$10
Paid by Respondent	$
Total	$10

Frank C. Jordan, Clerk, By J. Erb, Deputy.

77 In the Supreme Court of the State of California.

S. F. No. 3376.

HYMAN GREENBERG, Plaintiff and Respondent,
vs.
WESTERN TURF ASSOCIATION, Defendant and Respondent.

Clerk's Certificate to Record.

I, Frank C. Jordan, Clerk of the Supreme Court of the State of California, do hereby certify the foregoing to be a full, true and correct copy of the record in the above entitled cause, as the same remain of record and on file in the office of the Clerk of said Court; and I do further certify that the same constitute the return to the writ of error allowed by the Chief Justice of the said Supreme Court and herewith returned.

In witness whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, this 14th day of December, A. D. 1905.

[Seal Supreme Court of California.]

FRANK C. JORDAN,
Clerk of the Supreme Court,
By J. ERB, *Deputy Clerk.*

Endorsed on cover: File No. 20,064. California supreme court. Term No. 189. Western Turf Association, plaintiff in error, *vs.* Hyman Greenberg. Filed January 24th, 1906. File No. 20,064.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 9 1907
JAMES H. McKENNEY,
CLERK.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 189.

WESTERN TURF ASSOCIATION, PLAINTIFF IN ERROR,

vs.

HYMAN GREENBERG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED

IN THE SUPREME COURT OF THE UNITED STATES.

WESTERN TURF ASSOCIATION,
Plaintiff in Error,

vs.

HYMAN GREENBERG,
Defendant in Error.

October Term, 1906.
No. 189.

BRIEF FOR PLAINTIFF IN ERROR.

On the 23rd day of March, 1893, the Legislature of the State of California passed an Act of which the following is a copy:

"Section 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-

course, fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

"Section 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this Act, is entitled to recover from the proprietor, lessee, or their agents, or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

"Section 3. This Act shall take effect immediately."

The plaintiff in error at the times in question was conducting a race-course. For certain reasons it was unwilling that the defendant in error should have access to its grounds. The defendant in error persisted, however, in purchasing a ticket day after day, although informed by the Secretary of the Association that he would not be admitted to the track, and although he had been refused

admission about twenty-five times before the day in question. (Record, p. 13, fols. 26-27.)

On that day he succeeded in obtaining entrance to the grounds. Upon being discovered by certain officers of Morse's Police Patrol, who were acting for the Association, he was, according to their story, offered back his admission fee (one dollar) and requested to leave the track. He refused to leave and was put out by the use of force no greater than was necessary therefor.

He brought this action for damages. Upon the trial in the Superior Court for the City and County of San Francisco, the Association claimed that the statute above quoted was void as in contravention of the Fourteenth Amendment to the Constitution of the United States.

The trial judge instructed the jury to the contrary at the request of the plaintiff in the action, and refused the instructions requested by the Association, defendant. The verdict of the jury was in favor of the plaintiff for the sum of one thousand dollars damages, and judgment was entered accordingly.

Upon appeal to the Supreme Court of California, the contentions as to the unconstitutionality of the statute were repeated, and rights, privileges and immunities under the Fourteenth

Amendment were specially set up and claimed. The Supreme Court of California ruled against the plaintiff in error and affirmed the judgment of the trial court. Whereupon this writ of error was allowed by the Chief Justice of the Supreme Court of California.

In a former case of the same kind between the same parties (*Greenberg* vs *Western Turf Association,* 140 Cal., 357) the Supreme Court of California had sustained the validity of this statute, although reversing the judgment in that case upon other grounds. The opinion in this case affirms the ruling of the Court in the former case.

The following are the specifications of error, all of which are relied upon and intended to be urged, viz:

"The Superior Court erred in charging the jury as follows:

"Gentlemen of the Jury, I give you the following instructions, requested by the plaintiff:

"1. I will now read to you the Act of the Legislature entitled 'An Act making it lawful to refuse admission to places of amusement.'

" 'Section 1. It shall be unlawful for any corporation, person or association, or the proprietor,

lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

" 'Section 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this Act, is entitled to recover from the proprietor, lessee, or their agents, or from any person, association, corporation, or the directors thereof, his actual damages and $100 in addition thereto.

" 'Section 3. This Act shall take effect immediately.' "

The Superior Court erred in refusing to give to the jury the following instruction requested by the defendant (plaintiff in error herein):

"I instruct you that the Act of the Legislature of California of the year 1893, which has been referred to, is unconstitutional and void."

(3.) The Supreme Court erred in affirming the judgment of the Superior Court.

(4.) The Supreme Court of California erred in affirming the action of the Superior Court in giving to the jury the instruction firstly above mentioned, and in refusing to give to the jury the instruction secondly above mentioned.

(5.) The Supreme Court of California erred in holding to be constitutional and valid the statute of California approved March 23rd, 1893, entitled "An Act making it unlawful to refuse admission to places of amusement."

ARGUMENT.

In its former decision (140 Cal., 360, 361), the Supreme Court of California cited and relied upon the following cases:

Baylies vs. *Curry*, 128 Ill., 287;
People vs. *King*, 110 N. Y., 418;
Messenger vs. *State*, 25 Neb., 674;
Joseph vs. *Bidwell*, 28 La Ann., 382;
Donnell vs. *State*, 48 Miss., 661;
United States vs. *Newcombe*, 11 Phila., 519; Federal Cases No. 15,868;
Munn vs. *Illinois*, 94 U. S., 113.

Upon an examination of these cases it will be found that in each of them, except *Munn* vs

Illinois, the decision was based upon the Civil Rights Act, so-called; the person excluded or discriminated against being a colored person, and being so excluded or discriminated against solely because he was a colored person. It requires no argument or discussion to point the inapplicability of such cases to this case. The basis of the right asserted in those cases was not the right of access to the theater, but the right to be free from discrimination on account of race, color, or previous condition of servitude.

On the other hand, the appellant (plaintiff in error here) cited to the Supreme Court of California, among others, the following cases, none of which are noticed in either of the opinions:

District of Columbia vs. *Saville,* 1 McArthur, 581 (29 Am. Rep. 616);
Sharpe vs. *Whiteside,* 19 Fed. Rep., 156;
Gibbs vs. *Tally,* 133 Cal., 373;
State vs. *Associated Press,* 60 S. W. Rep., 191;
Leep vs. *St. Louis,* 25 S. W. Rep., 575.

In the first of the above cases a statute of the district had been passed, entitled "An Act to regulate shows and exhibitions in the sale and disposal of seats." It provided in substance that

it should be unlawful after the opening of the doors to sell reserved seats, or to mark as reserved, seats which had not in fact been reserved by the sale of tickets already made. It was said by the Court:

"The provisions of the Act are attempted to be justified on the ground that it is a mere police regulation, and as such within the competence of the late Legislative Assembly to enact. We are all of the opinion that the Act has nothing whatever of the character of a police regulation, but, on the contrary, that it is unwise, vexatious and unlawful interference with the rights of private property."

In the case of *Sharpe* vs. *Whiteside*, the defendant was the owner of a popular resort known as the Point of Lookout Mountain. She made a contract with a livery-stable keeper by which his passengers only should be allowed access to the grounds. A rival livery-stable keeper obtained in the State Court, before removal, a preliminary injunction to prevent discrimination against his passengers. The injunction was dissolved by the Circuit Court. After treating of the right to control railroads and other public service corporations, it was said (page 161):

"There is no such ground for jurisdiction in the case under consideration. There is no necessity, public or other, for people to visit Lookout Point. That is a mere matter of taste, pleasure, curiosity. Commerce, the public weal, social order, the public health or comfort, have nothing to do with it." At page 173 of the Report will be found a well-considered note under the heading: "When there is no public duty there may be discrimination."

In *Gibbs* vs. *Talley*, the Supreme Court of California held to be invalid a law requiring owners of property to execute bonds in connection with building contracts. At page 376 it was said that to impose such a burden upon the owner was to some extent to deprive him of his property. And on page 377 it was further said:

"It is also an unreasonable and unnecessary restriction upon the power to make contracts (citing authorities).

"It clearly contravenes the provisions of Section 1 of Article I of the Constitution of the State, and the Fourteenth Amendment to the Constitution of the United States. It is not—and clearly it could not be—contended that this law is a regulation which comes within what is called the police power. It is not calculated, nor was it in-

tended, to conserve the safety, health, or *general* welfare of the community."

(It is not generally supposed that the public morals will be promoted by encouraging people to go to race-tracks or by forcing the proprietors to grant them admission.)

It may be gathered from the record in this case, and the former case between the same parties, that the reason for excluding the defendant in error from the grounds was that he insisted upon publishing a newspaper called a racing chart or form chart, whereas the Association had sold the exclusive privilege so to do to other persons. Surely the Association had the right to make such a contract, perhaps for the protection of the public, and for the reputation of its own grounds; as also for the profits to be directly derived from the contract.

Apart from this special statute, a ticket of admission to a place of amusement is, and always has been, merely a license. The authorities to this effect were cited in the former case, and the Supreme Court of California held in conformity with them. But if this statute be valid it is no longer possible for two persons to contract for the issuance of a license to a place of amusement. This

statute also makes it a *penal offense* (140 Cal., 364) for a person who has made a civil contract to violate it. It is understood that every person has that right, of course holding himself responsible in damages.

The plaintiff in error is a private corporation, conducting a private business, upon its own private premises. There is no suggestion that it was in anywise exercising a public use, or that it had ever received aid or special privileges from the State, or even a license to transact business.

This statute does not seek to impress upon theaters, race-tracks, etc., a use in favor of the public generally. It would of course be void if it attempted so to do. This statute is in favor of those members of the public only who have purchased tickets, and the proprietor is left free to sell or to refuse to sell tickets to whom he pleases. The statute does not require the ticket to be purchased directly from the proprietor of the theater or other place of amusement. The purchase may be made from a third person, and of course it may be effected without the knowledge of the proprietor by means of a messenger, or purchased from the railroad company selling tickets for transportation including admission, as appeared to be the case in the former action. This statute

is special as affecting only persons conducting places of amusement, and affecting only contracts for admission to such places. In that respect also it is submitted to be in violation of the Constitution in denying the equal protection of the laws.

Respectfully submitted,

W. S. GOODFELLOW,

Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,
vs.
HYMAN GREENBERG,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

WILLIAM G. BURKE,
Attorney for Defendant in Error.

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This action was commenced in the Superior Court of the City and County of San Francisco, State of California, by the defendant in error, against the plaintiff in error, to recover the sum of $10,100. damages alleged to have been sustained by defendant in error, by reason of an unlawful assault made upon him by the employees of the plaintiff in error, as a result of which he sustained the

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severe injuries described in his complaint and proven upon the trial. (Record, pp. 8-9.)

A verdict was rendered in favor of the defendant in error for the sum of $1,000.00, upon which judgment was entered. From this judgment, and from an order subsequently made by the trial court denying its motion for new trial, plaintiff in error appealed to the Supreme Court of the State of California, by which court the judgment and order appealed from were affirmed. (Record, pp. 11; 32-36.) From the judgment rendered by the Supreme Court, a writ of error has been prosecuted to this court.

The sole question to be determined by this Court is whether a certain act passed by the Legislature of the State of California on the 23d day of March, 1893, a copy of which is set forth in the brief filed on behalf of plaintiff in error, is constitutional.

FACTS.

It is alleged in the complaint filed by the defendant in error that the plaintiff in error was and is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, and that at all of the times therein mentioned it was and is the owner and proprietor of a certain race-course, situate in the County of

San Mateo, State of California, known and designated as "Tanforan Park".

It is also alleged in said complaint

"That on the 3rd day of January, 1900, said de-
" fendant was engaged in managing and conduct-
" ing said race-course as a place of *public entertain-*
" *ment and amusement.*" (Record, p. 8.)

In the answer filed by the plaintiff in error to said complaint, while it is denied that it is the proprietor of said race-course, it admits that at all of said times it was and is the lessee and in possession thereof, and expressly admits, by failure to deny, that on the date in question it was managing and conducting said race-course as a *place of public entertainment and amusement.* (Fol. 17.)

It will, therefore, be seen by the Court that it is an admitted fact in this case that the race-course from which plaintiff in error undertook to and did exclude the defendant in error was being operated and conducted by plaintiff in error as a place of *public* amusement and entertainment.

On the 3rd day of January, 1900, the defendant in error, then a young man, conceded by plaintiff in error, in the pleadings, to be of good moral character, and who was connected with the "Evening Bulletin", one of the newspapers published and circulated in San Francisco, purchased a ticket of admission to the race-course maintained by the plaintiff in error at Tanforan, for the purpose of

witnessing the races which were to be conducted therein on the afternoon of that day. Upon presenting the ticket at one of the gates he was admitted to the track. He then walked up to the Judges' stand, where he engaged in conversation with several people, among whom were some of the officials of the race-track. While thus engaged in conversation, and in the presence of some three or four thousand people, with many of whom he was acquainted, two of the employees of the plaintiff in error, without a word of warning to defendant in error, took hold of him with great force and dragged him through the crowd and out of the track to a point distant 200 feet from its entrance. During this assault they tore his clothes, bruised and dazed him, cut his neck, and injured him generally. (Record, pp. 13, 20.)

It is suggested in the brief filed by plaintiff in error that the reason for excluding the defendant in error from the grounds was because he insisted upon publishing a racing chart or form chart, the privileges for publishing which had been sold by the plaintiff in error to some other persons. The record in this case is absolutely barren of any suggestion, establishing such to be the fact. In fact, the testimony practically without contradiction shows that although the defendant in error had been upon former occasions excluded from the race-course, he had been informed by the officials connected with the Secretary's office that this order

of exclusion was no longer in force and that he would be permitted to go upon the track whenever he saw fit. (Record, pp. 13-14-15.)

It was also suggested that before expelling the defendant in error from the track the purchase price of the ticket was tendered to him and he was requested to leave. While this was the contention of the plaintiff in error, it was positively denied by the defendant in error and some of his witnesses. (Record, pp. 14-15.)

ARGUMENT.

It will be observed by the Court from a reading of the Statute claimed to be unconstitutional that it is applicable only to places of *public* amusement or entertainment.

Section 1 of the Statute is as follows:

> "Section 1. It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of *public amusement or entertainment*, to refuse admittance. * * *"

As we have already shown, it is admitted in the pleadings by plaintiff in error that it was managing and conducting the race-course from which defendant in error was excluded, as a place of *public* amusement and entertainment.

The question to be determined then resolves itself into this proposition: Has the Legislature of a State the right to supervise or regulate the conduct of a place of *public* amusement or entertainment? That it possesses such right, and that, therefore, the statute in question is constitutional, has been so frequently determined that it is now no longer open to further controversy.

The case of

Munn v. People of Illinois, 94 U. S. 113.

is a leading case upon this subject. The State of Illinois had passed a statute fixing the maximum of charges for the storage of grain in certain warehouses in that State in which grain was stored in bulk and in which the grain of different owners was mixed together. It was claimed on the part of the plaintiff in error that the law was unconstitutional, among other reasons, as being repugnant to the 14th amendment of the Constitution of the United States. In upholding the constitutionality of the act, this court held that when private property is devoted to a public use it is subject to public regulation, and after citing many cases, Mr. Chief Justice Waite, who delivered the opinion of the court, said:

> "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.
>
> "It matters not in this case that these plaintiffs in error had built their warehouses and

established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on, subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted. * * *

"We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment."

This case has been frequently followed by this Court in many decisions, all of which are so familiar to the Court, that it is unnecessary to cite them in this brief.

Speaking with reference to the character of places of public amusement, Mr. Justice Harlan, in his dissenting opinion in the

Civil Rights Cases, 109 U. S. 3-62,

said:

"As to places of public amusement. It may be argued that the managers of such places have no duties to perform with which the pub-

lic are, in any legal sense, concerned, or with which the public have any right to interfere; and that the exclusion of a black man from a place of public amusement on account of his race, or the denial to him, on that ground, of equal accommodations at such places, violates no legal right for the vindication of which he may invoke the aid of the courts. My answer is, that places of public amusement, within the meaning of the Act of 1875, are such as are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement imports, in law, equality of right, at such places, among all the members of that public. This must be so, unless it be —which I deny—that the common municipal government of all the people may, in the exertion of its powers, conferred for the benefit of all, discriminate or authorize discrimination against a particular race, solely because of its former condition of servitude."

The identical question under consideration here was decided by the Appellate Court of New York, adversely to the contention of the plaintiff in error, in the case of

Grannan v. Westchester Racing Assn., 16 App. Div. 8, 44 N. Y. Sup. 790.

That was an action to declare null and void a certain resolution of the defendant Jockey Club, and to enjoin defendants from enforcing such resolution

against plaintiff and from depriving him of any of the privileges enjoyed by the public at the various meetings by the stewards of the Jockey Club. The lower Court denied an injunction, *pendente lite*, from which order the plaintiff appealed.

In reversing the order made by the lower Court, after setting forth the facts showing that the plaintiff had purchased a ticket of admission to the racecourse, that he was refused admission thereto and excluded therefrom, the Court said:

> * * * "It is therefore plain that it is the purpose and policy of the State to control and regulate the business of racing, and to invest the association which shall so engage therein with quasi public functions; the State exercising control and supervision by means of a commission, and in certain respects through other officers of the State. This is the clear legal effect of the provisions of the act, and is also in accordance with its spirit and intent. What circumstances will serve to impress upon private property a public interest is not at all times clear. But, within certain well-defined lines, we may say that property is affected with a public interest, although beyond these limits the right is doubtful, and finally fades away in the imperceptible dividing line. The case, however, is clear enough, as is said by Judge Cooley, 'if one is permitted to take upon himself a public employment, with special privileges, which only the State can confer upon him.' Cooley, Const. Lim. 736. And the learned author further says that property in business is affected with a public interest 'where the business is one the following of which is not of right, but is permitted by the State as a privilege or franchise'.

Id. 738. Under this head he groups the case of toll bridges, and other public franchises of like character. As we have before remarked, the franchise enjoyed by the Westchester Racing Association falls within this classification, and in this respect the case is plain, beyond doubt. Indeed, the clear settlement of the right of the public in respect to private property devoted to public use reaches far beyond the limits of the present case. *Property essentially private property, used in connection with no franchise derived from the State when devoted to public use, as it effects the public at large, becomes clothed with a public use, which continues so long as the devotion and use are continued.* This is the effect of the decision in the Munn case, 94 U. S. 119, and the decisions of our own courts. (Citing *People v. Budd*, 117 N. Y. 1.) This rule was extended to embrace a skating rink, although concededly the owner of the rink derived no special privilege or protection from the State, and no right existed in the public, in any legal sense, to resort thereto. (Citing *People v. King*, 110 N. Y. 418.) This principle becomes important here, when we shall come to consider the public obligation assumed by the racing association in this case, and the right of individuals composing the public in connection therewith. The distinction which exists between a corporation which is private, and which conducts a private business, and one which receives a special privilege and franchise from the State, is clearly pointed out by Mr. Justice Cullen in *People v. Association*, 41 Hun. 439. In the case of a private corporation, the only franchise which it obtains is the franchise to be a corporation. But the business which may be carried on by it is not other or different than that which might have been carried on by a partnership or by an individual without the aid of an act of the legislature. In the case of

a quasi public corporation, its right to existence and to carry on its business is derived solely from the act which creates it, and does not permit of its being done otherwise. * * * It is also the averment of the complaint that the defendant the Westchester Racing Association holds at its race track in Westchester County public meetings, at which regular running races are advertised, and to which the general public are invited, and admitted upon payment of the regular entrance fee. *So that it appears that not only is the public function impressed upon the association by virtue of the Statute, but in recognition thereof, and for its own purposes, it holds itself out as conducting its business for the benefit of the public.* Whether it be for the amusement of the public or its profit, or both, is of little consequence, as the association assumes to do what the policy of the State provided it should do. This being its character, and its conduct fulfilling the public expectation, what are its obligations to the public generally, and to the plaintiff as one of the public?"

And after calling attention to the duty which the Racing Association owes to the general public, it is said:

"There is, however, another conclusive answer to the contention of the defendants. By the provisions of chapter 1042, Laws 1895, it is provided that all persons within the jurisdiction of the State shall be entitled to full and equal privileges in all places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens. It is plain that the racing of horses is in the nature of an amusement. As we have seen, the property and place where such races are conducted, have become clothed with

public interest, and the Association, by reason of its franchise from the State, is under the public obligation to conduct its business for the benefit of the public, in pursuance of the obligation thereby created to fulfill the purpose of its existence. This implies that its gates shall be open to all citizens and its property subject to use by all who desire to go thereon, and who comply with its reasonable rules and regulations. The first section of the Civil Rights Act is absolute in its declaration of right, and is not qualified by anything contained in its subsequent sections. Its declaration is that all persons shall be entitled to the privilege, subject only to the conditions and limitations established by law. The second section provides a penalty for denial of any of the provisions of the first section. * * * By the law of the land, as we have seen, it is the absolute right of any citizen who conducts himself properly, and who complies with the reasonable rules of the public corporation, to enjoy the benefits secured to him thereby; and it is beyond the power of such an association to provide by any rule for the permanent exclusion of any citizen from such place, or exclude him from participation in its benefits. The argument of the learned counsel for the defendants, that the corporation has the right to exclude by a rule which operates upon all citizens alike, cannot be sustained, as, if followed out to its logical result, it might be made to operate to the exclusion of all citizens. * * * We have already considered the law and its limitations. It requires corporations of this character to admit all persons who present themselves in fit condition, demean themselves properly, and who comply with the reasonable rules and regulations. And this question is determined by the condition of the person at the time when he demands the right. The denial

of such right to a person so situated becomes, therefore, a violation of this Statute." * * *

In the case *Baylies v. Curry,* 128 Ill., 287, the appellee, who was a colored woman, applied for tickets to defendant's theatre, which were refused. She then had a white man obtain the tickets and she and her husband entered the theatre, where they were refused seats. Their money was returned to them, and she and her husband went away.

Appellant in that case on the trial offered to prove that, in order to avoid collision between the races, he had adopted a rule to the effect that the colored people should have one row to themselves in each part of the house, or as many rows as the tickets which they bought would call for, which evidence was rejected by the Court. He also offered to prove that it was a rule of his theatre that colored persons were given the same advantages in all parts of the theatre, except that they were assigned to particular rows of seats, which evidence was also rejected.

The defendant also requested the Court to give to the jury the following instructions, viz.:

"The jury are instructed that the defendants "were legally justified in assigning colored persons "to seats in the theatre of defendant Baylies, "separate and apart from the seats of white per- "sons, provided the seats to which such colored "persons were assigned were equally comfortable "and well situated.

"You are instructed as a matter of law that the "proprietor or manager of a theatre has the right "to make such reasonable rules as he may see fit "regarding the seating of the occupants of his "theatre, or the disposition, arrangement or classi- "fication of tickets sold to different persons. "* * * "

Both instructions were refused by the Court.

On appeal the Court said:

> "The rule requiring colored persons to sit in the same row, separate and apart from white people, manifestly had no tendency to justify either of these exclusions.
>
> "Beyond all question, Sections 1 and 2 of the 'Act to protect all citizens in their civil and legal rights, and fixing a penalty for violation of the same', approved June 10, 1885, prohibit the denial of access to the theatre, and to the several circles or grades of seats therein, because of a race or color, for such is, in effect, the language employed. Section 1 says: 'All persons within the jurisdiction of said State shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of * * * theatres. * * *' Section 2 says: 'Any person who shall violate any of the provisions of the foregoing section, by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated * * *' It would be difficult to employ more comprehensive and sweeping language to abolish all distinctions in accommodations, facilities, privileges or advantages in theatres on account of race or color

than that thus employed. But it is enough for the present that it includes denial of access to the theatres, and denial to the first balcony of the theatre, and that it is not contended, nor in our opinion can it reasonably be contended, that these sections are inoperative by reason of repugnance to provisions of the Constitution of this State or of the United States."

The case of *People v. King,* 110 N. Y. 418 (18 N. E., 245), is peculiarly in point.

Section 283 of the Penal Code declares that:

"No citizen of this State can, by reason of race, color or previous condition of servitude be excluded from the equal enjoyment of any accommodations, facilities or privileges furnished by innkeepers or common carriers, or by owners, manager or lessees of theatres or other places of amusement. * * *"

The violation of this section is made a misdemeanor.

The defendant and one Scott were the owners and proprietors of a skating rink, and prior to June 13, 1884, announced in the public press that the rink would be opened on the evening of that day and an exhibition of roller skating would be given. Several hundred people attended the exhibition. During the evening three colored men made application for tickets, which were refused. King, having been indicted under the statute and convicted, appealed.

In affirming the judgment of the lower Court, the Court used the following language:

"* * * The real question in the case arises upon the contention of the counsel for the appellant that the statute upon which the indictment is founded, *so far as it undertakes to prescribe that the owner of a place of amusement shall not exclude therefrom any citizen by reason of race, color or previous condition of servitude, is an unconstitutional interference with private rights in that it restricts the owner of property in respect to its lawful use and as to an incident which is not a legitimate matter of regulation by law.* The legislation in question is not without precedent. The Act of Congress of March 1, 1875, entitled 'An act to protect all persons in their civil rights' (18 U. S. St. at large, 335), contains a section identical in import with Section 383 of the Penal Code, except that it is still broader in its scope, and secures, not to citizens only, but to all persons within the jurisdiction of the United States, the equal enjoyment of the accommodation, advantages, facilities and privileges of * * * theatres and other places of public amusement * * * (Citing other instances.)

"It is not necessary at this day to enter into any argument to prove that the clause in the Bill of Rights that no person shall 'be deprived of life, liberty or property without due process of law', is to have a large and liberal interpretation, and that the fundamental principle of free government expressed in these words protects not only life, liberty and property in a strict and technical sense against unlawful invasion by the government in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights. * * *

"This legislation is under what, for lack of better name, is called the 'police power of the State'—a power incapable of exact definition,

but the existence of which is essential to every well-ordered government. By means of this power the Legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community; and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts cannot interfere. *In short, the police power covers a wide range of particular, unexpressed powers reserved to the State, affecting wisdom of action, personal conduct and the use and control of property.* * * *

"It is evident that to exclude colored people from places of public resort on account of their race is to fix upon them a brand of inferiority, and tends to fix their position as a servile and dependent people. It is, of course, impossible to enforce social equality by law. But the law in question simply insures to colored citizens the right to admission, on equal terms with others, to public resorts, *and to equal enjoyment of privileges of a quasi-public character.* The law in question cannot be set aside, then, because it has no basis in the public interest; and the promotion of the public good is the main purpose for which the police power may be exerted; and whether, in a given case, it shall be exerted or not, the Legislature is the sole judge, and a law will not be held invalid because, in the judgment of a court, its enactment was expedient or unwise.

"The final question, therefore, is, Does the law in question invade this right of property, protected by the Constitution? * * * Can

the State impose upon individuals having *places of public resort* the same restriction which the Federal Constitution places upon the State? It is not claimed that that part of the statute giving to colored people equal rights at the hands of inn-keepers and common carriers is an infraction of the Constitution. But the business of an inn-keeper or common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the State. By the common law, inn-keepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them so to do. *The business of conducting a theatre or place of public amusement is also a private business, in which any one may engage in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the Legislature to confer upon municipalities the power to regulate by ordinance the licensing of theatres and shows and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.* * * *?*

"In the judgment of the Legislature, the public had an interest to prevent race discrimination between citizens on the part of persons maintaining places of public amusement; and the *quasi-public use to which the owner of such a place devoted his property gives the Legislature a right to interfere.* * * * The Statute does not interfere with private entertainments, or prevent persons not engaged in the business of keeping a place of *public* amusement from regulating admission to an entertainment given for a social, public, or private purpose as they may deem best; nor does it seek to compel social equality. It was, we think, a valid exercise of

> the police power of the State over a subject within the cognizance of the Legislature. The judgment should be affirmed."

In the case of

Messenger v. State, 41 N. W. 638,

the defendant, who kept a barber shop, was indicted for refusing to shave a negro. Upon appeal from the judgment of conviction, the Court said:

> "In 1885, the Legislature passed 'An act to provide that all citizens shall be entitled to the same civil rights, and to punish all persons for violation of its provisions'. Section 1 provides that 'All persons within this State shall be entitled to the full and equal enjoyment of the accomodations, advantages, facilities and privileges of inns, public conveyances, barber shops, theatres and other places of amusement. * *

Section 2 provides for the penalty. * * *

> "There is no doubt of the authority of the State to prevent discrimination against certain individuals or races because of their color or previous condition. A barber, by opening up a shop and putting out his sign, thereby invites every orderly and well-behaved person who may desire his services to enter his shop during business hours. The Statute will not permit him to say to one: 'You are a slave, or a son of a slave! Therefore, I will not shave you. * * The authority of the State to prohibit discrimination on account of color in places of public resort, as a barber shop, is undoubted. * * *"

It is suggested in the brief filed on behalf of the plaintiff in error that the cases based upon the Civil

Rights Act are not applicable because the basis of the right asserted in those cases was not the right of access to a theatre, but the right to be free from discrimination on account of race, color or previous condition of servitude. In making this statement the learned counsel is in error. If a person conducting a place of public amusement or entertainment has an absolute right to exclude therefrom any person whom he sees fit to exclude, he would have as much right to exclude a colored person as he would to exclude a white man. And if he has no right to exclude a colored person, not alone because of the Civil Rights Act, but because the State, in the exercise of its "*police power*", has authority to regulate the conduct of a place of *public* amusement and entertainment, he has no right to exclude therefrom a white citizen or any other person.

The constitutionality of the Statute under consideration has been twice upheld by the Supreme Court of California.

In its last decision, rendered by the Court sitting in Bank, and from which decision this writ of error is presented, Mr. Justice Henshaw, speaking for the Court, in a well considered opinion said:

> "It is next contended that the act under which plaintiff sought his recovery is unconstitutional, and in this regard it is insisted that the construction put upon the act in 140 Cal. 357, 73 Pac. 1050, is erroneous. Herein appellant contends that the statute is in contravention of the fourteenth amendment to the Constitution of the United States, and Section 1 of the Declar-

ation of Rights of the State of California, and this court is asked to reconsider the construction which heretofore it has put upon the Act. The argument of appellant in this respect seems to be that as at common law the purchaser of a ticket to a place of amusement held only a revocable license, and the proprietor of such a place of amusement could either refuse the holder of the ticket admission, or eject him after admission, not being responsible in court, but merely in contract, for the price of the ticket, and the necessary expenses incurred by the purchaser, no subsequent legislation by the State can modify this common law rule, except in one particular, and that is, that the exclusion cannot be by way of race discrimination, and because of 'race, color, or previous condition of servitude', and that, as the Act in question is not designed to meet this condition, or to effectuate this end, it is an unwarranted invasion of the rights which the defendant enjoyed before the passage of the Act under the rule as it existed at common law. If the right of State legislatures to pass an Act such as this rested upon the proposition enunciated, the acts themselves would be of no value, for, as pointed out in the note to McCrea v. Marsh, 71 Am. Dec. 745: 'The States might pass such laws, but, if a ticket to a theatre is but a revocable license, they would be of little effect as, if the theatre proprietor desired to exclude colored persons, he might do so merely by revoking the license, and it would be impossible to determine whether it was revoked by reason of 'race, color, or previous condition of servitude'. The truth of the matter is that the right of the State rests upon no such flimsy foundation. It is based upon its fundamental right, when not acting in contravention to its constitution or to the constitution of the United States, to modify the common law. As is said in Charge to Grand Jury, 1 Hughes,

> 541, Fed. Cas. No. 18,258, 'A State has the Constitutional and legislative power to change or modify the common law, and by Statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, &c.' As pointed out in 1 Dillon, Municipal Corporations (4th Ed.) §357: 'Charges not infrequently confer upon the corporation the power to 'license and regulate' or to license, regulate, and tax 'certain vocations and enjoyments, and to 'tax and restrain' or 'prohibit' exhibitions, shows, places of amusement, and the like, and, unless there is some specified limitation on the authority of the Legislature in this respect, such provisions are constitutional.' The State, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power and not at all as having to do with civil rights, that the Act in question was upheld in 140 Cal. and 73 Pac., and its constitutionality is here again affirmed."
>
> *Greenberg v. Western Turf Assn.*, 82 Pac. 684.

See also

> *Greenberg v. Western Turf Assn.*, 140 Cal. 360,

being the first decision rendered in Department.

Upon these two decisions alone defendant in error could with absolute confidence as to the result, rest his cause.

In conclusion, we desire to suggest that it is universally known that the conduct of the business in which plaintiff in error is engaged, as to the places in which and times when races may be held, is

regulated by Statute or Ordinance in almost every State in the Union. In San Francisco, for illustration, races can only be run at the Ingleside Tract and then only for a few weeks each year. In fact, in many communities, racing, as a form of public amusement, is entirely prohibited.

If Statutes and Ordinances, such as these, do not violate any provision of the Constitution, which must be conceded, it cannot be successfully contended that the Statute made the subject of attack here is unconstitutional.

For the considerations stated, it is respectfully submitted that the Act in question contravenes neither the language nor the spirit of any provision of the Federal Constitution, and that the judgment from which this writ of error is prosecuted, should be affirmed.

Dated, Jan. 14th, 1907.

Respectfully submitted,

WILLIAM G. BURKE,
Attorney for Defendant in Error.

Office Supreme Court, U. S.
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No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WESTERN TURF ASSOCIATION
(a Corporation),
Plaintiff in Error,
vs.
HYMAN GREENBERG,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

WILLIAM G. BURKE,
Attorney for Defendant in Error.

Pernau Publishing Co., S. F.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

In this case we desire to direct the Court's attention to a point inadvertently omitted from the brief filed on behalf of defendant in error, due to the fact that defendant in error's copy of the record in this case was destroyed in the recent conflagration in San Francisco, and no copy thereof was procured by him until after the preparation of his brief had been practically completed.

The writ of error in this case should be dismissed, because the record fails to show that any claim was ever made that a Federal question was involved, or that the statute, upon which this action was commenced, violated any provision of the Federal Constitution.

Upon the trial in the Superior Court, plaintiff in error requested the Court to give to the jury the following instruction, viz: "I instruct you that "the Act of the Legislature of California of the "year 1893, which has been referred to, is uncon- "stitutional and void." (Record, page 29, folio 62.)

The Court will observe that nothing is stated in this requested instruction that the Act in question violated any of the provisions of the Federal Constitution.

The natural import of the language used and the inference to be drawn therefrom is that it violated some provision of the Constitution of the State of California, and nowhere in the pleadings, or in any other part of the record (exclusive of the opinion rendered by the Supreme Court, which this Court will not examine for the purpose of determining whether a Federal question is involved) is there any claim made that the statute in question violates either the provisions of the Constitution of the State of California, or those of the Federal Constitution, or that any Federal question was involved in the determination of the controversy.

For these reasons, it is contended on behalf of the defendant in error that the writ of error issued to this Court should be dismissed.

In support of the contention of defendant in error, the case of

Otis v. Oregon Steamship Co., 115 U. S. 548,

is directly in point. In that case this Court, in dismissing the appeal, said:

> "Neither in the pleadings nor in the evidence nor in the findings nor in the exceptions as shown by the record was there any title, right, privilege or immunity specially set up or claimed under the Constitution or a law or authority of the United States. The sole issue in the case was as to the agency of Otis. The Steamship Company alleged that he made the contract as its agent; and this he denied. There was no suggestion of the illegality of such an agency. The only dispute was as to the fact of its existence." (Citing *Moore v. Miss.*, 21 Wall 639.)

In this latter case, in which the same question was considered by this Court, in dismissing the writ of error, Mr. Chief Justice Waite, speaking for the Court, said:

> "We are not required to re-examine the judgment of a State Court simply because a Federal question may have been decided. To give us jurisdiction, it must appear that such a question 'was necessarily involved in the decision.' (Citing Armstrong v. Treas., 16 Pet. 282.) The old rule, established by early cases, restricted our inquiries as to the existence and decision of the question 'to the face of the rec-

ord.' Previous to the Act of 1867, R. S., Sec. 709, it was uniformly held, except as to the State of Louisiana, where a peculiar practice prevails, that we would not look into the opinions of the Courts to ascertain what had been decided. (Citing many cases.) Since that Act, however, in Murdock v. Memphis (ante 429), we intimated that we might, under some circumstances, examine those opinions, when properly authenticated, as far as might be useful, for the purpose of ascertaining that fact, but at the same time were careful to say that, 'After all, the record of the case, its pleadings, bills of exceptions, judgments, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of inquiry; and while we are not prepared to fix any absolute limit to the sources of inquiry, under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation.' We are not now called upon to fix this limit. It is sufficient for all the purposes of this case to hold as we do, that if the record shows upon its face that a Federal question was not necessarily involved, and does not show that one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided."

For these reasons, it is respectfully submitted that the writ of error should be dismissed.

Dated, Jan. 22nd, 1906.

WM. G. BURKE,
Attorney for Defendant in Error.

*Due service and receipt of a copy of the within this*_____

day of January, A. D. 1907, is hereby admitted.

_____

Attorney for Plaintiff in Error.

Supreme Court of the United States.

No. 189.—October Term, 1906.

Western Turf Association, Plaintiff in Error, vs. Hyman Greenberg. } In error to the Supreme Court of the State of California.

[February 25th 1907.]

Mr. Justice Harlan delivered the opinion of the Court.

The plaintiff in error is a corporation of California, and the lessee, in possession, of a race-course kept as a place of public entertainment and amusement, and to which it was accustomed to issue tickets of admission. The defendant Greenberg purchased one of such tickets, and was admitted to the race-course. After being admitted he was ejected from the premises against his will by police officers, acting, it was alleged in the complaint, by the direction of the plaintiff. The defendant denied responsibility for the acts of those officers. It was sued by Greenberg in one of the courts of California, and there was a verdict and judgment against the Association for the sum of one thousand dollars. The case was taken to the Supreme Court of the State and the judgment was affirmed. 148 *Cal.* 126.

At the trial a question was raised as to the applicability to this case of a statute of California relating to the admission of persons holding tickets of admission to places of public entertainment and amusement. That statute is as follows: "It shall be unlawful for any corporation, person or association, or the proprietor, lessee, or the agents of either, of any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years who presents a ticket of admission acquired by purchase, and who demands admission to such place, provided that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement. § 2. Any person who is refused admission to any place of amusement, contrary to the provisions of this act, is entitled to recover from the proprietors, lessees or their agents, or from any person, association, corporation, or the directors thereof, his actual damage and $100 in addition thereto."

1. The record sufficiently shows that in the Supreme Court of the State the defendant questioned the validity of the statute in question under the

Fourteenth Amendment, in that it "seeks to abridge the privileges and immunities of citizens of the United States, and to deprive them of liberty and property without due process of law, and to deny to them, being within its jurisdiction, the equal protection of the laws." By the judgment below the validity of the statute was sustained, the court holding that it was a legitimate exertion of the police power of the State. The contention that this court is without jurisdiction to review that judgment is, therefore, overruled.

2. The Supreme Court of the State in a previous decision between the same parties—*Greenberg* v. *Western Turf Association*, 140 *Cal.* 357, 360—held the statute to be constitutional as a valid regulation imposed by the State in its exercise of police power. That decision, we assume, from the opinion of the court, had reference only to the constitution of California. But this court can only pass upon the validity of the statute with reference to the Constitution of the United States. We perceive no reason for holding it to be invalid under that instrument. The contention that it is unconstitutional as denying to the defendant the equal protection of the laws is without merit, for the statute is applicable alike to all persons, corporations or associations conducting places of public amusement or entertainment. Of still less merit is the suggestion that the statute abridges the rights and privileges of citizens; for a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a State.

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for, the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. *Northwestern Life Insurance Co.* v. *Riggs*, 203 *U. S.* 243. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative. Decisions of this court, familiar to all, and which need not be cited, recognize the possession, by each State, of powers never surrendered to the General Government; which powers the State, except as restrained by its own constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well-being, comfort and good order of the people. The enactments of a State, when exerting its power for such purposes, must be respected by this court, if they do not violate rights granted or secured by the Supreme Law of the land. In view of these settled principles, the defendant is not justified in invoking the Constitution of the United States. The statute

is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to every one holding a ticket of admission, and who is not at the time under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced by tickets of admission issued and sold to parties wishing to attend its race-course. Such a regulation, in itself just, is likewise promotive of peace and good order among those who attend places of public entertainment or amusement. It is neither an arbitrary exertion of the State's inherent or governmental power, nor a violation of any right secured by the Constitution of the United States. The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment, be admitted. The case requires nothing further to be said.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court U. S.